

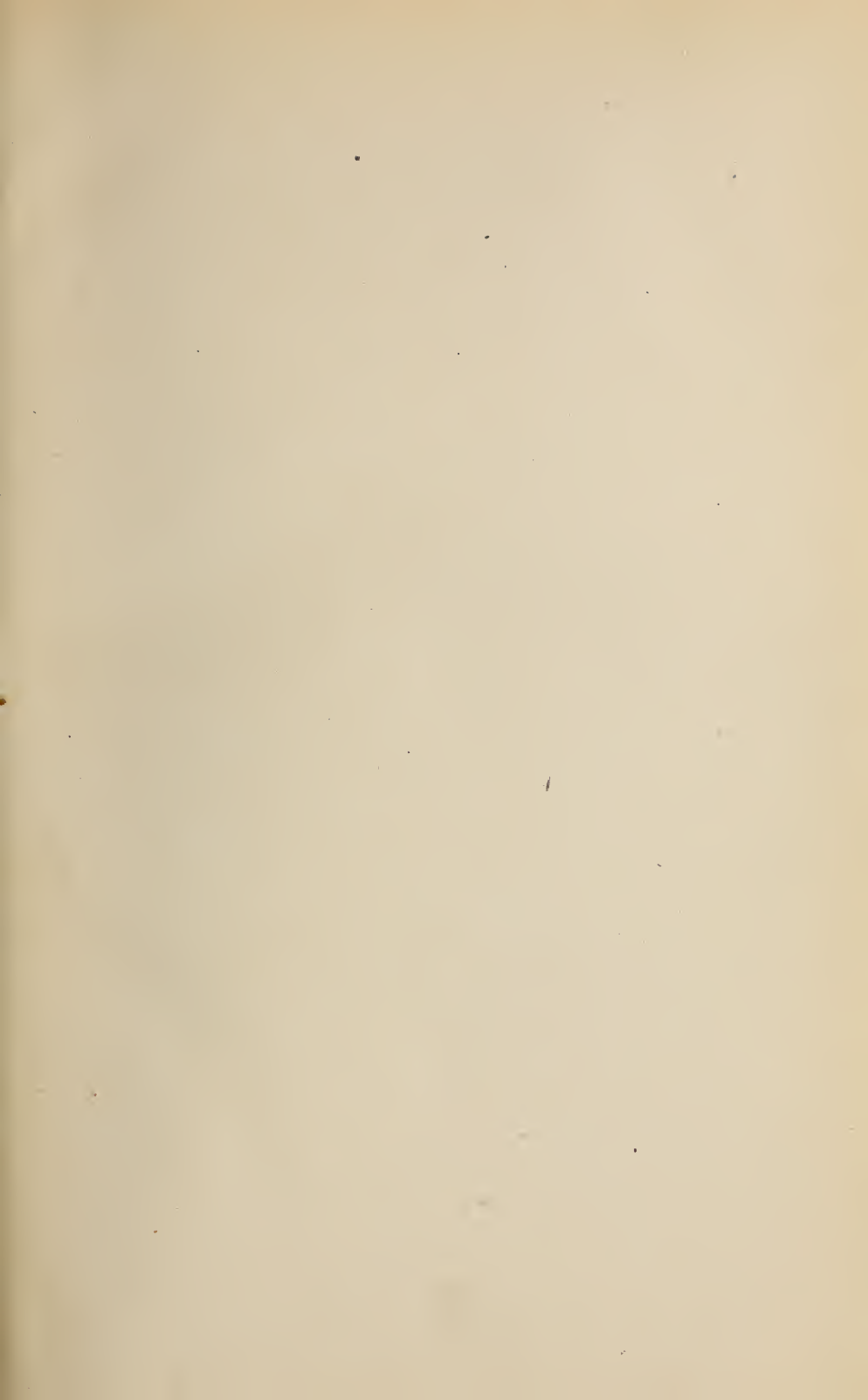


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THE
ONTARIO LAW REPORTS.

CASES DETERMINED IN THE COURT OF APPEAL
AND IN THE HIGH COURT OF JUSTICE
FOR ONTARIO.

1908. 96

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DURING THE PERIOD OF THESE REPORTS.

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On the 5th of May, 1908, the Honourable FRANCIS ROBERT LATCHFORD, one of His Majesty's Counsel, was appointed one of the Justices of the Chancery Division, in the place of the Honourable JAMES PITT MABEE, appointed Chief Commissioner of the Board of Railway Commissioners for Canada.

On the 26th of June, 1908, the King was pleased to confer the honour of Knighthood upon the Honourable GLENHOLME FALCONBRIDGE, Chief Justice of the King's Bench.

During Easter Term, 1908, the following were called to the Bar:—

WALLACE JOHN MCKAY, JOHN CARSCALLEN SHERRY, WILLIAM FARQUHAR McRAE, WILLIAM EDWARD WILLIAMS, ANGUS COMPSTON HEIGHINGTON, MOLYNEUX LOCKHART GORDON, HENRY HOWITT, EDWIN WILBUR KEARNEY, MISS GRACE ELLEN HEWSON, FREDERIC WATT, RICHARD RUDDOCK WADDELL, NEIL DOUGLAS MACLEAN, GEORGE ARTHUR CRUISE, ALEXANDER MALCOLM MANSON, FRED HOLMES HOPKINS, ARNO LINDNER BITZER, FREDERICK SPENSER SIDNEY DUNLEVIE, HAROLD ARTHUR CLEMENT MACHIN, DONALD JAMES COWAN, JOHN NOBLE BLACK, OSCAR FREDERICK TAYLOR.

During Trinity Term, 1908, the following gentlemen were called to the Bar:—

CHARLES MICHAEL GARVEY, STUART CAMERON KIRKLAND, EUGENE COLEMAN SPEREMAN, ROBERT JOHN VALENTINE MCGOWAN, EDWARD WARNER WRIGHT, JAMES EDGAR PARSONS, HENRY PORTER COOKE, HUGH CALAIS MACDONALD, JOHN FRANCIS BOLAND, WILLIAM BALFOUR MUDIE, LYNN BRISTOL SPENCER, HUGH JOHN MACDONALD, WESLEY ASHTON GORDON, JAMES HENRY COOKE, JAMES HUGH GILLMOR WALLACE, HARRY USSHER THOMSON.

ERRATA ET CORRIGENDA.

- Page 132, head note, line 20, for "two-thirds" read "three-fifths."
" 172, head note, last line, for "does" read "do."
" 202, line 16, for "proportion" read "proposition."
" 259, head note, line 7, for "or" read "are."
" 301, line 25, for "by" read "to."
" 314, head note, line 8, for "personality" read "personalty."
" 350, head note, line 7, for "plaintiff" read "deceased."
" 372, head note, line 2, for "without" read "with."
" 392, line 6, from bottom, for "delegate" read "derogate."
" 444, line 8, from bottom, for "plaintiff's" read "defendant's."

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REPORTS OF CASES

DETERMINED IN THE

COURT OF APPEAL

AND IN THE

HIGH COURT OF JUSTICE FOR ONTARIO.

[DIVISIONAL COURT.]

LAWSON V. PACKARD ELECTRIC CO., LIMITED.

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*Negligence—Infant—Dangerous Machine—Duty to Warn—Superintendence—
Workman's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3,
sub-sec. 2.*

Oct. 1.
Dec. 30.

The plaintiff, a boy under fifteen, was engaged by the foreman of the defendants' factory to help any one who needed help on a certain floor, except one man who was doing piecework. He had been helping a man who was operating a stamping machine, to put plates through the machine, and the former leaving for a few minutes, he took hold of the press and endeavoured to get a plate out, and, apparently through his inadvertently touching the foot press, the die came down upon his hand, and he lost three fingers. It was admitted that the machine was a dangerous machine:—

Held (CLUTE, J., dissenting), that the defendants were liable under sec. 3, sub-sec. 2, of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, inasmuch as the foreman, whilst exercising superintendence, was negligent in not pointing out to the plaintiff which of the machines were dangerous, and cautioning and instructing him as to them, and, if it was intended that he should not attempt to operate any of them, expressly forbidding him to do so.

THIS was an appeal by the defendants from the following judgment of MABEE, J., delivered after the trial of this action at the non-jury sittings at St. Catharines, on September 30th, 1907.

H. H. Collier, K.C., for the plaintiff.

E. D. Armour, K.C., and *G. B. Burson*, for the defendant.

October 1. MABEE, J.:—The plaintiff entered the defendants' employ in May last, and on June 19th met with an accident while attempting to take a tin plate out of a stamping machine. He lost the ends of three fingers. He was between fourteen and fifteen years of age, had no knowledge of machinery of any kind,

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and was engaged by Mr. Pope, the defendants' foreman upon the floor in question, to help anyone there who needed help, except one Gallagher, who was doing piecework. He was given no instructions how to operate any of the machines—the foreman said it was not intended that he was to operate any—nor was he given any warning as to any of them being dangerous. In other words, he was just turned loose upon this floor, with general instructions to help anyone and everyone (except Gallagher), with no word of caution or warning of any description. On June 19th he was helping George Hill to put the plates through the stamping machine in question; they were carried to the machine by the plaintiff and Hill; the latter was to operate the press, then, after they were stamped, the plaintiff was to carry them away. Hill had left the machine for a few moments, and Pope called out and asked, in effect, if the two were going to be all day in getting the plates through, whereupon the plaintiff, in the absence of Hill, took hold of the press, and endeavoured to get a plate out, when the die came down upon his hand. It is tripped by a foot press, and this the plaintiff must have inadvertently touched, as it appears it had never been known to fall without pressure upon that part. Hill had been accustomed to use a stick to take the plates out, but this had been misplaced. The accident plainly occurred by reason of the plaintiff's endeavour to get the plates put through without delay, and his attempting to remove one from a machine about which he had never been instructed nor warned as to its danger. Pope had authority to employ the plaintiff, and was acting under such authority. Was he negligent in not cautioning the plaintiff as to the danger of the machines? It is admitted the machine in question is dangerous, and the foreman said there was no way to guard it. Was it not the duty of the foreman to point out to the plaintiff the dangerous machines, and caution him, or give some instructions as to how he should approach them, and if it was intended he should not attempt to operate any of them, forbid him from so doing?

I have no hesitation in holding his omission to take this reasonable and sensible course to be the grossest kind of negligence. The dangers surrounding the work the boy was put at were apparent to the foreman. They were by no means appreciated by this inexperienced boy, and I am of opinion that the plain duty of

any foreman, under the like circumstances, is to point out, to caution, and to warn, and omission to do so is negligence. The evidence does not disclose that the foreman made any examination of the boy's capacity for appreciating danger, and so he was allowed to commence without any care being taken to ascertain his ability to perform the work he was being set at. It is clear that the instructions given him to help those requiring his assistance would, sooner or later, take him to assist someone in working a dangerous machine, just as, in the result, he was called upon to help Hill. He is, then, directed to perform what may be hazardous work, and of which he has had no experience, and, as I understand the liability and duty of masters under such circumstances, it is that they are bound to point out the dangers connected with that work, thus enabling the infant employee to comprehend and avoid them, and omission so to do is carelessness that makes the employer liable for the consequences that follow.

I was prepared to deal with the case and make the foregoing findings at the trial, but Mr. Armour contended that the defendants were not liable even if the foreman had been guilty of negligence in omitting to caution, and relied upon the recent case of *Cribb v. Kynock, Limited*, [1907] 2 K. B. 548, where it was held that the doctrine of common employment applied, and that, although there was a duty on an employer to give instructions to a young and inexperienced person employed by him in dangerous work, that duty was one that could be delegated to a foreman, and that the negligence of the foreman was a risk which a fellow servant, even though an infant, takes upon himself. The report of this case states that the action was based solely upon the common law liability, and so, I presume, there was some reason why the plaintiff was not able to invoke the assistance of the Employers' Liability Act.

The plaintiff here is entitled to rely upon the provisions of R.S.O. 1897, ch. 160, sec. 3, sub-sec. 2, which provides for personal injuries caused by the negligence of any person in the service of the employer "who has any superintendence" entrusted to him, whilst exercising such superintendence, and in such cases the statute has swept away the defence of common employment. So here the foreman, Pope, was in the service of the defendants, and was

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entrusted with the superintendence of hiring men to work on this floor, and while he was so exercising such superintendence he was guilty of an omission of duty towards the plaintiff which I think was plainly negligence. I do not read the *Cribb* case as in any way cutting down or limiting the provisions of the Employers' Liability Act, and, therefore, I do not regard it as assisting in the solution of any case here based upon the provisions of our Workman's Compensation for Injuries Act, R.S.O. 1897, ch. 160.

I think the plaintiff's case can also be based upon sub-sec. 3 of sec. 3 of the Act, and, if desired, the pleadings may be so amended. The plaintiff was bound to conform to the directions of Pope, and at the time of his injury he was so conforming—namely, helping Hill—and injury resulted from his having so conformed. I think it was negligence in the foreman in so directing the plaintiff to assist at the working of a dangerous machine, without himself giving some instructions, or warning, or seeing that the operator of the machine did.

I do not think the plaintiff has any redress under the provisions of the Factories Act, R.S.O. 1897, ch. 256, as it does not appear that the machine in itself could have been rendered less dangerous by any sort of guard or protection.

I think the plaintiff is entitled to recover, and I assess the damages at \$600.

Judgment for plaintiff for \$600 damages and costs.

The appeal was argued before MULOCK, C.J.Ex.D., and BRITTON and CLUTE, JJ., on November 26th, 1907.

E. D. Armour, K.C., and *G. B. Burson*, for the defendants, contended that the boy was not hired for the purpose of working the machine which caused the accident, and brought the trouble on himself; at common law it was clear he could not recover: *Cribb v. Kynoch Limited*, [1907] 2 K.B. 548, following *Wilson v. Merry* (1868), L.R. 1 H.L. (Sc.) 332, and followed in *Young v. Hoffman Manufacturing Co.*, [1907] 2 K.B. 646; that the defence of common employment was only swept away by the Employers' Liability Act, where there is a person entrusted with superintendence, and the accident occurs while he is engaged in such superintendence: R.S.O. 1897, ch. 160, sec. 3 (2); *Shaffers v. General Steam Navigation*

Co. (1883), 10 Q.B.D. 356; *Griffiths v. Earl of Dudley* (1882), 9 Q.B.D. 357, at p. 362; *Roberts and Wallace on Employers' Liability Act*, 3rd ed., at pp. 22, 252; that there was no duty in the defendants to instruct the plaintiff not to use a machine which he was not hired to use: *Labatt on Master and Servant*, vol. 2, p. 1851; *Young v. Hoffman Manufacturing Co.*, *supra*, at pp. 656, 659; *Degg v. Midland R.W. Co.* (1857), 26 L.J. Exch. 171; *Potter v. Faulkner* (1861), 31 L.J.Q.B. 30; that the plaintiff could not enlarge the liability of his employer by doing something which he was not hired to do; that if the plaintiff had used the stick to take the tins out, the accident would not have happened, and he must have seen the other boy use the stick in this way; that to take a case out of the common law rule the accident must occur while the superintendent is superintending, for the Act says "while in the exercise of such superintendence." They also cited *Davey v. London and South-Western R.W. Co.* (1883), 12 Q.B.D. 70; *Thomas v. Quartermaine* (1887), 18 Q.B.D. 685; *Osborne v. Jackson* (1883), 11 Q.B.D. 619.

H. H. Collier, K.C., for the plaintiff, contended that the accident arose from the negligence of the defendants, and consisted in the failure of their foreman to warn the plaintiff, and that this negligence occurred at the time of the hiring, when the foreman was exercising his superintendence: *Cribb v. Kynoch*, [1907] 2 K.B. 548; *Labatt on Master and Servant*, vol. 1, pp. 558-61, 567-9; that the plaintiff was hired to help everybody on that floor except one man, who was doing piecework: *Armstrong v. Forg* (1895), 162 Mass. 544; that there was also negligence in that Pope saw that the stick was not there, and did not warn the plaintiff that the machine was not to be worked without it; that if the plaintiff was a volunteer and outside the scope of his duty, the machine was a dangerous machine and not properly guarded, inasmuch as the stick was not there, and thus there was liability under the Factories Act.

Armour, in reply, contended that the machine here was one which could not be guarded without its working being stopped: *Roberts and Wallace*, *ibid.* p. 242.

December 30. MULLOCK, C.J.:—This action is brought by the plaintiff for damages because of injuries sustained by him

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when working a stamping machine in the defendants' factory, whereby three of his fingers were cut off. He did not by his statement of claim specifically rest his right of action upon the Workmen's Compensation for Injuries Act, but the learned trial Judge gave him leave to amend by claiming under it. He is, therefore, entitled to make such amendments as will give him the benefit of the Act, and I deal with the case as if the amendments had been made.

During the argument before us Mr. Armour observed that if such amendments were allowed, he would have the right to plead the omission of the plaintiff to give the statutory notice of the injury. This right he should have, and, if any issue arises in consequence of the plaintiff's amendment, it may be tried and dealt with by the Divisional Court, before judgment on this appeal is entered.

Dealing, then, with the merits of the case, it seems that the plaintiff, a schoolboy fourteen years old in the previous February, was, about the 29th of May, 1907, engaged by Mr. Pope, the defendants' foreman of the down stairs department, to work in their factory, and upon the 19th of June following he met with the accident in question.

On the floor where the plaintiff worked were different machines, amongst them a varnishing machine, a drill, and a stamping machine, the latter being used for punching out tin plates. The power which drove this machine was communicated to it by a belt, which passed over the driving shaft, and the stamping machine was set in motion by the operator pressing his foot upon the treadle; thereupon the stamp descended on the metal and punched out the metal plate. This had to be removed before another plate was stamped, and, in the meantime, the machine was stopped by the operator taking his foot off the treadle. The custom was to remove the stamped plate by means of a stick, but on the occasion in question the stick had been mislaid, and the plaintiff, who was operating the machine, endeavoured to remove the plate with his hand, when the punch descended and caused the injury complained of. The machine was in order, and the inference is that the plaintiff inadvertently pressed his foot upon the treadle, causing the punch to descend whilst his hand was underneath it removing the stamped plate.

The defendants say that the plaintiff had no right to operate the machine, and that, therefore, they are not responsible for the accident. From the nature of Pope's instructions to him the plaintiff supposed it to be his duty to run the machine. The defendants, however, say that his instructions were not open to such construction. If Pope's instructions were such that, no matter what he intended by them, they did in fact receive from the plaintiff the construction he placed upon them, then it is a question who is responsible for the consequences of such misunderstanding. This question involves general consideration of the defendants' duty towards this plaintiff when engaging him to work in a room in the vicinity of dangerous machinery, and to assist generally all who were engaged on that floor, and who were also more or less employed in running this machinery.

The defendants' counsel, relying upon *Cribb v. Kynoch, Limited*, [1907] 2 K.B. 548, argued that, though the plaintiff was a young and inexperienced person, still he must be held to have assumed the risk of the negligence of Pope, a fellow workman, but here that defence is cut away by the Act in question, which makes the master responsible for the negligence of his superintendent. As stated by Lord Watson, in *Smith v. Baker et al.*, [1891] A.C. 354: "The main, although not the sole, object of the Act of 1880 was to place masters who do not, upon the same footing of responsibility with those who do, personally superintend their works and workmen, by making them answerable for the negligence of those persons to whom they entrust the duty of superintendence, as if it were their own."

Sub-section 2 of sec. 3 of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, enacts that "where personal injury is caused to a workman . . . by reason of the negligence of any person in the service of the employer, who has any superintendence entrusted to him, whilst in the exercise of such superintendence, the workman . . . shall have the same right of compensation and remedies against the employer as if the workman had not been a workman of, nor in the service of the employer, nor engaged in his work." Here Pope was in the service of the defendants as foreman, engaged the plaintiff, and gave him certain instructions, and at the time of the accident Pope was in the exercise of such superintendence. If, then, the accident happened

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because of Pope's negligence, the principle enunciated in *Cribb v. Kynoch, Limited*, would have no application.

The question to determine is what duty, if any, did the defendants owe to the plaintiff, the breach of which caused the injury.

It is the master's duty to exercise reasonable care for the safety of his servant, by making known to him the risks which he incurs when operating dangerous machinery, and (if he is not to operate it) by giving him instructions to that effect in language sufficiently definite not to be reasonably open to the opposite conclusion. Obviously, no arbitrary standard of such duty can be set up, but it must vary according to circumstances. The object to be served is to make reasonably clear to the servant the services required of him and the risks which he incurs in order that, realizing them, he may be on his guard to prevent injurious results. Thus, if the employee be an expert, knowing and fully appreciating the risks of his employment, the master would thereby be relieved of the superfluous task of pointing them out to him, but if the employee be inexperienced or with but a limited knowledge of the risks, or does not fully appreciate them, then the master's duty is to exercise such degree of care as the circumstances demand in order that the employee may know and intelligently realize the dangers which accompany his employment.

In discussing this subject in *Grizzel v. Frost* (1863), 3 F. & F. 623, Cockburn, C.J., at *Nisi Prius*, says: "I am of opinion that if the owners of dangerous machinery, by their foreman, employ a young person about it quite inexperienced in its use, either without proper directions as to its use or with directions which are improper and which are likely to lead to danger, of which the young person is not aware, and of which they are aware, as it is their duty to take reasonable care to avert such danger, they are responsible for any injury which may ensue from the use of such machinery."

Again, in *Robinson v. W. H. Smith & Son* (1900), 17 Times. L.R. 235, which was the case of a boy twelve years of age, employed by the defendants to deliver newspapers from their bookstall at the railway station to customers in the town, the plaintiff was not warned not to cross the railway. It was held that the employment being a dangerous one, in regard to which a duty was thrown on the defendants of taking special care, there was evi-

dence of negligence to go to the jury. Mr. Justice Wills says:—
“It is all very well to say that delivering newspapers was not in itself dangerous, but if done under circumstances such as these, namely, that the newspapers were brought from the railway station, and the persons delivering them had to cross the line, and these persons were boys, and a class of persons anxious to be insubordinate, it was, in his opinion, a dangerous employment, and one in regard to which a duty was thrown upon the employer to take special care. He was far from assuming that the defendants had not done everything that was right, but the question was merely whether the matter ought to be investigated, and he thought that it was a matter for investigation. Everyone knew that if boys were not well watched, they would get themselves into danger when there was an opportunity of doing so, and it did look as if things were done in a hap-hazard way in this case. It seemed that the plaintiff was allowed to be shewn his duties by another boy. As the evidence stood he was given no instructions or warnings not to go on the line, and one knew that boys were certain, in some cases, to be ambitious to try and get a reputation for smartness. A reasonable precaution, therefore, would have been for the defendants to make it known among the boys that to get a reputation for smartness by risking their lives on the line was not the way to get promotion.”

In *Murphy v. Smith* (1865), 19 C.B.N.S. 361, the plaintiff, a boy sixteen years of age, was employed in a match factory, of which the foreman was one Simlack, who had engaged the plaintiff. A portion of the process of manufacturing matches consisted in mixing a fluid, composed of a number of chemical substances, which, if stirred by an inexperienced person, was liable to explode. It was no part of the plaintiff's duty to touch this mixture. However, on the occasion in question he stirred it with a stick, thereby causing the explosion which injured the plaintiff, and an action was brought against the master because of such injury. It appears that at the time of the accident Simlack was absent from the room, and another employee, Debar, was standing by, but did not instruct the plaintiff not to stir the mixture. The jury found that Debar was guilty of negligence in standing by while the plaintiff stirred the mixture, and a verdict was returned for the plaintiff. On a motion for non suit

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on the ground that there was no evidence to shew that Debar was the manager, Erle, C.J., in delivering the judgment of the Court, which directed a non suit, said, at p. 367: "There was evidence for the jury that Simlack was placed by the defendant in the position of a vice-principal. If the case had rested there, I would have been inclined to think that the verdict ought to stand." The verdict, however, was set aside because the accident was the result of the negligence of Debar, a fellow workman. If it had been Simlack's negligence the verdict would have been sustained, although the accident occurred by reason of the plaintiff doing something which he was not instructed to do, and which was wholly unauthorized by the defendants. This case, in fact, suggests that it is the duty of the employers not to employ inexperienced persons in connection with dangerous works, and to leave them in such position that they may of their own volition do something in connection with such dangerous works which may cause the injury.

In *Crocker v. Banks* (1888), 4 Times L.R. 324, a girl seventeen years old was injured by the bursting of a soda water bottle whilst she was, in the course of her duty, engaged in filling it. The evidence shewed that she was an expert hand, but had omitted to use a mask provided for her at a certain stage in the operations. She swore that she did not know of the danger for protection against which the mask was provided, and Lord Esher, M.R., says: "It was not negligence for a girl of her years to omit to put on the mask if she did not know she was bound to do so at that period of the operation."

In *Bartonshill Coal Co. v. McGuire* (1858), 3 Macq., 300, at p. 311, the Lord Chancellor, in commenting on the case of *O'Byrne v. Burn* (1854), 16 Dunlop 1025, says: "She (the servant) was an inexperienced girl employed in a hazardous manufactory, placed under the control, and, it may be added, the protection, of an overseer, who was appointed by the defender, and entrusted with this duty. And it might well be considered that by employing such a helpless and ignorant child, the master contracted to keep her out of harm's way in assigning to her any work to be performed."

In *Moore v. Moore* (1901), 4 O.L.R. 167, the facts as set forth in the judgment of Armour, C.J.O., were that the plaintiff, a lad fourteen or fifteen years of age, was employed in the defendants'

factory in putting pieces of board cuttings into boxes, shovelling shavings, cleaning the floor, and on one occasion cleaning the machinery by which he was afterwards injured. At the time of his injury Ward, who was in charge of the machine, ordered him to bring up some boards to put through the machine, and he brought up an armful, and was going back for more when Ward called him back to straighten the boards. At this time Ward was not at the machine, but looking out of the window. The plaintiff went back to straighten the boards, passing the machine, and, not observing that it was running, put his hand out to brush some dust off the machine, when his arm was cut off by the knives.

It was not his duty on this occasion to have brushed the machine. The machine was not guarded as required by the Factories Act. Armour, C.J., saying that the object of the provision of the Act in requiring dangerous parts of machinery, as far as practical, to be guarded "was for the protection not only of those operating such machinery, but also those whose business brings them into proximity to such machinery," and dealing with the act of the plaintiff in putting out his hand, says: "A person may be exercising reasonable care, and in a moment of thoughtlessness, forgetfulness, or inattention may meet with an injury caused by the deliberate negligence of another, and it cannot be said that such momentary thoughtlessness, forgetfulness, or inattention will, as a matter of law, deprive him of his remedy for his injury caused by the deliberate negligence of the other, but it must in all such cases be a question of fact for the jury to determine."

These cases shew that it is the master's duty towards young and inexperienced persons to exercise reasonable care by the giving of instructions and warnings, and the adoption of other precautions, with a view to preventing injury happening to them, both when their duties require them to operate dangerous machinery and also when, on duty, though not in the discharge of their duties, they might, by reason of thoughtlessness or inadvertence, be exposed to danger brought by the master within their reach, and suffer injury which would in all reasonable probability have been avoided had the master exercised such reasonable care.

The plaintiff's evidence is that on his engagement by Pope he "was told to help every person that was needing help, all

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except one man, Mr. Coleman, who was on piecework." Pope says he told him to sweep the floor and to help anybody that needed him around the floor.

At first the plaintiff worked at picking up tins that had been varnished and putting them in piles. This was followed by his working on the varnishing machine, then on the drill, and, lastly, on the stamping machine. Pope knew he was working the varnishing machine and drill.

At the time of the plaintiff's engagement a boy named Hill was working the stamping machine, and his duties were to sweep the floor, clean up around the machine, carry plates to the machine, punch them, remove stamped plates, and carry them away and pile them up. It does not appear at whose instance the plaintiff came to assist Hill, but Pope knew he was doing so. At times the plaintiff and Hill together swept the floor and carried plates to and from the stamping machine, but, until the occasion of the accident, the plaintiff did not work it. On that day Hill and the plaintiff were together at the machine, when Pope appeared, and, according to the uncontradicted evidence of the plaintiff, swore at them, asking whether it was going to take them all day to get their work done. The work which he was urging them to do was stamping plates with the machine. Pope was in a temper, and, after relieving himself by an outburst of profanity at the boys, went away. Thereupon Hill, with the assistance of the plaintiff, put on the belt, and then went upstairs for a drink, leaving the plaintiff alone at the machine. He started it to work when the accident happened. No one had informed him that it was a dangerous machine, or had, in express language, instructed him either to work or not to work it; but when he found himself alone that day, he assumed it was his duty to work it. The moment before Pope had been swearing at the boys for not getting on with the work. When the plaintiff found himself alone at the machine, Hill having had the belt thrown on before leaving, and the plaintiff, doubtless, remembering Pope's language because of their supposed dilatoriness in not getting on with the stamping, was it unreasonable for him to have assumed that during Hill's absence it was his duty not to be idle, but to work the machine? Pope's remonstrance would lead to that conclusion, as would also Hill's throwing on the belt, and then leaving.

There was nothing in the terms of the plaintiff's engagement forbidding his working the machine, but, on the contrary, they are sufficiently loose to include it as part of his duties. He was told in general words to assist everyone in the work of the floor. Those instructions were sufficiently comprehensive to make it his duty to assist Hill by doing any part of Hill's work. Pope did not tell the plaintiff who was to instruct him in his duties, but left him at large to assist generally on the floor, without naming any person from whom he was to take orders, or that he was to take instructions from anyone.

Whether on this point he was to be governed by his own judgment or that of others is left an open question. The defendants, in thus sending a lad into a room where dangerous machinery was being operated, with instructions open to the construction that he should assist in its operation, not warning him as to the dangerous nature of the machinery, and not placing him under the direction of any one person to direct him, but, as the defendants now in fact suggest, subject to the directions of all those working in that room, did not, I think, discharge their duty towards him. It would have been impracticable for him to take directions from each and all of his fellow workmen, and it was not unreasonable for him to have assumed under the circumstances that he was to endeavour, according to his own judgment, to make himself useful.

In his judgment his instructions were open to this interpretation, and he was injured when doing what he deemed to be his duty. We have not the exact words in which his instructions were clothed, but they were such as to cause him to assume that operating the machine was part of his duties. If he was not to do so, it was, under the circumstances, the duty of the defendants to have made that point clear to him.

Perhaps Pope's instructions would have sufficed in the case of a person of mature mind, or one familiar with the methods adopted in factories for the guidance of workmen, but more care should have been exercised in the case of a schoolboy, now for the first time entering a factory, and it was the defendants' duty, if he was to operate the machine, to instruct him how he might do so with safety, and if he was not to operate it, then it was their duty to have pointed out to him the danger to arise from his med-

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dling with it. They did neither, and thus failed in their duty to adopt reasonable care for his safety, and are liable for the plaintiff's injury, which was the direct result of the defendants' negligence.

The maxim *volenti non fit injuria* was urged as a defence, but the facts shew that it is not here applicable. Whether the plaintiff took the risk of working the stamping machine is a question of fact. Before the maxim can serve as a defence it must appear that the plaintiff not only knew, but also appreciated, the risk. He has sworn that he did not know it to be dangerous to operate the machine. The learned trial Judge, seeing the plaintiff in the box, had the advantage of judging whether, from his apparent intelligence, notwithstanding his youth and inexperience, he was likely to have appreciated the danger, and has found in his favour and an appellate court is not entitled to disregard his finding of fact.

In my opinion, the appeal must be dismissed with costs.

Britton, J., concurred.

CLUTE, J.:—The plaintiff, a boy of fifteen, was engaged by the defendants as helper, and had been in their employment about three weeks when he was injured by a punch machine, resulting in the loss of three fingers.

The case, in the view I take of it, turns upon the nature and scope of the plaintiff's employment, and as to whether he was, in fact, in the discharge of his duty at the time of the accident.

The plaintiff states that he was "told to help every person that was needing help except one man who was on piecework;" that he was never asked to work on a machine by Pope, the man who engaged him for the defendants; that he had never worked on the machine before the day he was hurt; that he was hired as a helper, and on the day in question he was helping Hill, who was running the punch machine. He, with Hill, was engaged in getting the plates to the punch machine. Hill went to get a drink, and while he was away the plaintiff started the machine by putting his foot on the press; the machine came down and cut the plate, he removed his foot from the press and reached forward to remove the plate, when he must have inadvertently put his foot on the press, when the machine again came down,

cutting off three fingers. This all occurred in the absence of Hill. Hill, when asked if the plaintiff was to help run the machine, said "Not as I know of."

"Q. Were you told to let him use the machine? A. No, sir.

"Q. Did you tell him not to work the machine when you went upstairs? A. No, sir.

"Q. Did he ever work the machine while you were there before that day? A. Not as I know of."

The manager of the company swore that it was Pope's duty to have charge of the floor and to give the men their instructions as to what they were to do, and to give all necessary warnings; that Pope was a man who had had twenty years' experience in the work.

Pope says:—"Q. Tell me what he was employed to do—that is, what you told him to do? A. I told him to sweep the floor and to help anybody that needed help around the floor.

"Q. Then do I understand you to say that anyone that called the boy for help, the boy was to go and do it? A. Yes, and for the handling of stuff.

"Q. Was he ever told by you that he was to work any machine? A. No, sir.

"Q. Would helping include operating a machine? A. No, sir.

"Q. What were Hill's duties? A. To run the punch."

So that the result of the evidence is that the boy was not engaged to run this machine; that he was not asked, either by the foreman or Hill, to run the machine; that he never had run it until the day in question, and then he started it during the temporary absence of Hill for a drink.

Upon this evidence I find it impossible to say that the plaintiff was authorized to run this machine, or that it was within the scope of his employment.

But it was strongly urged that, owing to what had taken place on two other occasions, he was impliedly authorized to do so. The two previous occasions were, first, when he was asked by Clark to assist in putting the plates through the varnishing machine. With reference to this action Pope says that he never knew of the boy working on any of the machines in the shop, and that Clark would have the right to put the boy on the machine he was working at because the machine was harmless. On the other

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occasion he seems to have worked on a drill, but without the foreman's knowledge.

The boy admits that on the occasion in question he was not asked by Hill to work the machine, but he supposed he had to work the machine while Hill was away. Even if his story is to be accepted, which I find great difficulty in accepting, still I do not think this offers any shadow of ground for holding that the plaintiff was impliedly authorized to work the machine, or that in doing so he acted within the scope of his employment. He was a mere volunteer, and any obligation of the defendants towards the plaintiff must arise out of their contractual relation. It became the duty of the employer to warn him in respect of any danger in the course of his employment. At common law this duty would be sufficiently performed by employing a competent person to give such warning, even although he might neglect to do so, and this even in the case of an infant.

In *Cribb v. Kynoch*, [1907] 2 K.B. 548, it was held that where the plaintiff, a girl fifteen years old, was employed in the defendants' cartridge factory in the work of testing the gauge of loaded cartridges, under a forewoman, whose duty it was to give her proper instructions and warnings, and in consequence of whose negligent failure to do so, the plaintiff caused a cartridge to explode, thereby sustaining personal injuries, the doctrine of common employment applied, and the defendants were not liable because the duty to give instructions and warning is one which may be delegated to a foreman, and the negligence of the foreman is a risk which a fellow servant, even though an infant, takes upon himself. This case was approved by the Court of Appeal, in *Young v. Hoffman Manufacturing Co.*, [1907] 2 K.B. 646. In the latter case it was held that where the master employs an inexperienced workman upon dangerous work, it is his duty to instruct and caution him, but the master may delegate that duty to a competent person, and if he does so, he will not be liable for an injury to a workman resulting from the negligence of the delegate in not properly instructing or cautioning him, and there is no difference in this respect between an adult and an infant workman. Both of these cases are decisions under the common law.

It is clear, therefore, I think, that at common law the plaintiff cannot succeed. The statement of claim, although inaccu-

rately worded, gave indication of an intention to claim also under the Workman's Compensation Act, and an amendment was allowed at the trial making that intention clear.

The question, then, is whether the facts in this case enable the plaintiff to recover under sec. 3, sub-sec. 2, of the Act, by reason of the neglect of the foreman to give the plaintiff notice.

It was not disputed that the machine was a dangerous machine, and if the plaintiff was acting within the scope of his employment while working the machine, I would entertain no doubt of his right to recover. But, as is clearly pointed out in the above case, the obligation can only arise from the duty of the employer, and this duty, again, arises out of the contractual relation and is governed by it. It is obvious there can be no duty cast upon the defendants to give warning in regard to the working of a machine which the plaintiff was not expected to work, and in meddling with which the plaintiff was a mere volunteer, if not a trespasser. Sir Gorell Barnes, President, in *Young v. Hoffman Manufacturing Co.*, observes: "If a servant enters into the employment of a master, his rights must depend upon the terms of the contract between them, and, as in most cases nothing is said but to fix the wages and work to be done, the rest of the terms must be implied terms," and, after referring to Lord Bowen's judgment in *The Moorcock* (1889), 14 P.D. 64, at p. 68, as to the principle upon which the implied terms in a contract are to be gathered, he quotes a passage from the judgment of Shaw, C.J., in *Farwell v. Boston and Worcester Railroad Corporation* (1842), 4 Met. 49 (also to be found in 3 Macq. 316), as the most complete exposition of what constitutes common employment, and seems to be the source of the later decisions, and proceeds to quote as follows: "The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity, arising out of the relation of master and servant." The master, in the case supposed, is not exempt from liability because the servant has better means for providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer, but because the implied contract of the master does not extend to indemnify the servant against the

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negligence of anyone but himself, and he is not liable in tort, as for the negligence of his servant, because the person suffering does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied.' "

It was held by the Court of Appeal, in *Thomas v. Quartermaine*, 18 Q.B.D. 685, that the defence arising from the maxim *volenti non fit injuria* had not been affected by the Employers' Liability Act, 1880, the section of which corresponds to the section under consideration.

In that case the plaintiff was employed in a cooling room in the defendant's brewery. In the room were a boiling vat and a cooling vat, and between them ran a passage, which was in part only three feet wide. The cooling vat had a rim raised sixteen inches above the level of the passage, but it was not fenced or railed in. The plaintiff went along this passage to pull a board from under the boiling vat. This board stuck fast and then came away suddenly, so that he fell back into the cooling vat and was scalded. It was held that there was no evidence arising from a breach of duty on the part of the defendants towards the plaintiff, and that the plaintiff was not entitled to recover. Bowen, L.J., at p. 694, says: "In order to answer the first inquiry, whether the defendant had been guilty of negligence, the first step to be taken must be to consider what is the duty towards the plaintiff that it is alleged the defendant has broken, for the ideas of negligence and duty are strictly correlative, and there is no such thing as negligence in the abstract; negligence is simply neglect of some care which we are bound by law to exercise towards somebody. The common law imposes on the occupier of premises no abstract obligation at all as to the state in which he is to keep them, provided that he carries on no unlawful business and is guilty of no nuisance. In the case of premises that contain an element of danger, a duty arises as soon as there is a probability that people will go upon them, but it is a duty towards such people as actually do go. It is not a duty in the air, but a duty towards particular people. The occupier is bound to use all reasonable care to prevent such persons from being hurt. It is obvious that this duty must vary according to the character of the danger and the circumstances under which the premises are to be visited."

The plaintiff, in short, must shew the existence of a duty on

the part of the defendants, and that the plaintiff suffered as a direct consequence of the breach of such duty: *Roberts and Wallace on Employers*, 3rd ed., p. 22, and cases there cited.

The Act does not give a new cause of action; it simply provides that, where the section applies, the person injured shall have the same right of compensation and redress against the employer as if he had not been a workman of nor in the service of the employer, nor engaged in his work. What, then, is the plaintiff's position? He is not entitled to recover at common law because the injury arose from the negligence of a fellow workman. The Act removes the defence of common employment. The plaintiff still has to shew that, having regard to what he was called upon to do, the defendants were guilty of some breach of duty. If he was not called upon to work this machine, I can find no duty cast upon the defendants to warn him against the danger in working it. He saw fit to meddle with that with which he had no concern. The machine was perfectly safe, unless it was set in motion. The plaintiff, in my view, had no business to set it in motion, and has no right to look to the defendants for recovery which resulted from his own wrongful act. He was a volunteer, in so far as he assumed to act without authority in running the machine, and in that respect he was in no better position than a stranger, who, having business upon the premises, but out of sheer curiosity, might see fit to start the machine. He would do it at his own risk. One who avails himself of a mere license to enter upon premises imposes upon the owner no duty to have them in a safe condition: *Broom's Legal Maxims*, p. 270; *Gautret v. Egerton* (1867), L.R. 2 C.P. 371.

In the present case there was not even a license. The plaintiff's act was wholly unauthorized, and, so far as this machine is concerned, he was a mere volunteer.

In *Moore v. Moore*, 4 O.L.R. 167, the jury found that the cause of the accident was the negligence of the defendants in not having the machinery properly guarded, and it was there held that the provision in the Factories Act was for the protection not only of those operating such machinery, but also those whose business brings them in proximity to such machinery. The Factories Act having no application to the present case, that decision does not, in my judgment, apply.

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In *Grizzle v. Frost*, 3 F. & F. 622, as pointed out by Cockburn, C.J., there was evidence both of negative and positive negligence on the part of the foreman. Negative in not giving the girl proper instructions as to the use of the machine; positive in expressly directing her to do the very thing which she did, and which it was admitted was dangerous, so dangerous, indeed, that the case for the defence was that she had been told not to do it. The Chief Justice then proceeds: "Now, if either of those grounds of negligence are sustained, the defendants would be liable."

In the present case it is the absence of evidence of that kind that leads me to the conclusion that I have reached.

The observations of Mr. Justice Wills, in *Robinson v. Smith & Son*, 17 Times L.R. 235, is more in favour of the plaintiff than any other case I have read. But he pointed out in that case that there was evidence that the defendants' business was not carried on in a proper way, having regard to the class of persons in their employment, and he, therefore, thought the case ought to go to trial.

In that case the plaintiff was injured while discharging his duty for which he was employed. The bookstall was on the platform, surrounded by lines of railway, there being foot-bridges across the line. He was not warned not to cross the track, and so received the injury complained of. It appears to me that the above case is clearly distinguishable from the present, in that the plaintiff in that case received the injury while discharging his duty within the direct line of his employment. True, he should have taken the overhead bridge, but he was not told to do so. There was evidence, therefore, on the part of the employer to go to the jury, the employment being a dangerous one, in regard to which a duty was thrown upon the defendants of taking special care.

In *Crocker v. Banks*, 4 Times L.R. 324, the plaintiff was also doing the work for which she was employed, namely, filling soda water bottles. As pointed out by the Master of the Rolls, it was clear that during the process there was danger of the bottle bursting; the fact that the defendant provided masks was strong evidence that he knew of the danger, and, "having regard to the tender age of the person employed, the jury were justified in thinking that it was not sufficient for defendant to provide the

masks, but that it was his duty also to point out to such young people the existence of the danger and to insist on their wearing the mask. Since he had failed to do this, the jury might well say that he had been guilty of negligence."

In the present case I can find no neglect of duty which the defendants owed to the plaintiff, and, with deference, am of opinion that the plaintiff has wholly failed to establish any right of action.

The appeal, in my judgment, should be allowed, and the action dismissed with costs.

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[IN THE COURT OF APPEAL.]

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*Water and Water Courses—Rivers and Streams Act—District Judge—Order
Fixing Tolls on Logs Floated Prior to Order—Mandamus—Res Judicata.*

Jan. 25.
Nov. 2.

An application was made by the owners of certain constructions and improvements on a river to the district Judge, under R.S.O. 1897, ch. 142, sec. 13, for an appointment to fix a rate to be paid for tolls in respect of logs driven some three or four years previously, at which time no rate had been fixed. The district Judge refused to make the appointment. The applicant then applied to a Judge of the High Court for an order of mandamus requiring the district Judge to hear evidence and make an order fixing such tolls, which was refused, on the ground that the matter was *res judicata* under a former decision of a Divisional Court. (See 3 O.W.R. 333 and 10 O.L.R. 193.) The applicants then appealed to a Divisional Court, who dismissed the appeal granting leave to appeal to the Court of Appeal, who also dismissed the appeal, Garrow, J.A., dissenting.

THIS was an appeal from the judgment of the Divisional Court.

The applicants, the Beck Manufacturing Co., applied to Mabee, J., in Chambers, on January 8th, 1907, for an order of mandamus requiring Judge Valin, the district Judge of the district of Nipissing, to hear evidence for the purpose of fixing tolls which might be charged by the applicants in respect of logs driven on Post Creek in the township of Nipissing in the year 1903, and to make an order fixing such tolls. The applicants also applied for an order calling upon the Ontario Lumber Co. to shew cause against such order and for the payment by them of the costs of the application.

The plaintiffs, the Beck Manufacturing Co., had, in 1903,

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applied to the said district Judge, and obtained an order fixing the tolls to be paid for logs floated down a stream, called Post Creek, without specifying whether it was to be applicable to logs floated down in the past as well as in the future, or in the future only. On appeal to a Divisional Court, the order was set aside, the Court being of the opinion that it should have been limited to logs to be floated down after the making of the order; but that the district Judge had not had the necessary evidence before him on which he could make a proper finding, and that he had not taken into consideration certain matters required by the statute; and the order was set aside without prejudice to a further application being made by either party to the Judge to fix the tolls to be taken for the future by the plaintiffs upon the further necessary evidence.

The plaintiffs then applied to the district Judge, putting in further evidence, and obtained a new order fixing the tolls, as the defendants claimed, to logs to be subsequently floated down.

The plaintiffs claimed that under this order they were entitled to be paid for logs floated down prior to the making thereof, and, on the defendants' refusal to pay therefor, brought an action to recover the amount, which was tried before MacMahon, J., on March 6th, 1905, who held that he was bound by the previous judgment of the Divisional Court, which he was of the opinion limited the recovery to tolls for logs floated down after the making of the order, and he dismissed the action. An appeal was then had to a Divisional Court, and on June 1st, 1905, judgment was delivered, reported in 10 O.L.R. 193, affirming the judgment of the trial Judge. An appeal was then had to the Court of Appeal, and on June 16th, 1906, judgment was delivered, reported in 12 O.L.R. 163, dismissing the appeal.

The application for the further order was then made and the proceedings for a mandamus were taken.

A. B. Morine, for the applicants.

A. G. F. Lawrence, for the Ontario Lumber Co., respondents.

The judgment of the learned Judge was as follows:—

January 25. MABEE, J.:—If the proceedings are not in proper form the applicants may amend the same as they may be advised, if

this becomes necessary. The respondents' counsel did not object to this.

If the construction of the section of the Act in question, R.S.O. 1897, ch. 73, sec. 13, was open to me, I should have no hesitation in holding that the district court Judge's finding or order fixing the tolls need not be limited to future tolls. I think it is perfectly open, once the amount is fixed, for recovery to be had for past as well as future tolls. I think, however, I am clearly bound, as was the district court Judge, by the judgment of a Divisional Court in *Re Beck Manufacturing Co. and Ontario Lumber Co.* (1904), 3 O.W.R. 333.

Mr. Morine argued with much force that this decision had been overruled by the Court of Appeal in *Beck Manufacturing Co. v. Ontario Lumber Co.* (1906), 12 O.L.R. 163. The question decided by the Divisional Court was not expressly before the Court of Appeal, and, notwithstanding that the judgment of the former has been greatly shattered, it still stands.

In this view, I have no alternative but to refuse the mandamus asked for.

The respondents are entitled to their costs of opposing the motion.

From this judgment the applicants appealed to the Divisional Court.

On January 25th, 1907, the appeal was heard before FALCONBRIDGE, C.J.K.B., TEETZEL, and RIDDELL, JJ., the same counsel appearing, when the appeal was dismissed with costs; but leave was given to appeal to the Court of Appeal.

An appeal was then made to the Court of Appeal; and on May 8th, 1907, was heard before MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

A. B. Morine, for the appellants. In dealing with this matter, the rights enjoyed prior to the passing of the Act 47 & 48 Vict. ch. 17 (O.), now R.S.O. 1897, ch. 142, and the effect of that Act must be considered. Prior thereto the right to float logs down streams, etc., was common to all persons. The Act deals with improvements made on streams. Section 1 makes the user subject to provisions of the Act, one of which is that where improve-

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ments have been made, the user is made subject to the payment of reasonable tolls—that is, a liability to payment, to the persons who made the improvements: sec. 11; and by sec. 19 the proper mode of ascertaining the amount is by charging a reasonable toll per log. The fixing of the tolls is merely the method of arriving at the amount to be paid. It does not create the liability, and is not, therefore, a condition precedent to liability, but merely to recovery in an action. It is an alternative remedy. The right to have the tolls fixed is not limited to the owner of the improvements; but the respondents had such right, and it was their duty to have had them fixed before they used the stream, and in using the stream without having the tolls fixed, they impliedly agreed to pay the tolls when fixed, and are estopped from denying liability: *Burnett v. Lynch* (1826), 5 B. & C. 589. In the position they are taking they are guilty of fraud. The district Judge, by his first order, attempted to adjudicate as to what transactions in point of time the tolls should apply. This was beyond his jurisdiction, as it was a matter to be decided in an action, and the Divisional Court properly set the order aside. This is as far as the Divisional Court could go; anything beyond that was *obiter dictum*. The applicants have a perfect right to have the tolls fixed for 1903: see *Beck Manufacturing Co. v. Ontario Lumber Co.* (1906), 12 O.L.R. 163, and the judgments of Osler and Garrow, J.A. They are, therefore, entitled to a mandamus to compel the district Judge to do so.

G. F. Shepley, K.C., and *A. G. F. Lawrence*, for the respondents, the Ontario Lumber Company. The statute does not deprive the respondents of their right to use the stream; all it says is that the applicants might, if they thought fit, charge tolls for such use; but if they decided to do so, they must have the tolls fixed; no duty is imposed on them to do so: *Klokke v. Stanley* (1884), 101 Ill. 192; *People ex rel. Waters v. Commissioners of Emigration* (1861), 22 Howe Pr. N.Y. 291. The statute imposes a specific remedy, namely, a lien on the logs floated down, and there is no right of action. The tolls must be fixed prior to the logs being driven down, otherwise there could be no lien. The tolls, when fixed, are to be for all time, subject to variation. The district Judge, by his order of January 25, 1904, attempted to fix the tolls for a time anterior to the date on which they were fixed. The

Divisional Court, on appeal, held that this was beyond his jurisdiction, and set aside the order. The applicants acquiesced in this, and applied for an order in the terms of the judgment, viz., as to logs to be driven down subsequently thereto, and he made his order on this basis. The applicants are, therefore, bound by the judgment of the Divisional Court. The matter is *res judicata*. A mandamus only lies where the object is to admit or restore a person to an admitted right. Here at the most the right was a doubtful one. Where the object is to enforce an alleged duty under a statute the duty must be clear and unequivocal. The Judge, therefore, acted properly in refusing to fix the tolls, and the mandamus was properly refused: *Mackey v. Sherman* (1885), 8 O.R. 28; *Re Beck Manufacturing Co. and Ontario Lumber Co.*, 3 O.W.R. 333.

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November 2. Moss, C.J.O.:—From whatever point of view the proceedings to obtain a mandamus herein and this appeal may be regarded, they virtually resolve themselves into an attempt to substitute this Court as an appellate tribunal in the place of a Divisional Court of the High Court; and that too in a matter which as between the substantial litigants should be regarded as *res judicata*.

It is very apparent—indeed, it is not denied—that the applicants' object is to obtain an opinion from this Court whether the district Judge upon being applied to to give an appointment to fix a rate to be paid for tolls in respect of logs driven in the years 1902 and 1903 should have disregarded the decision and order of the Divisional Court pronounced in respect of the same logs and reported in 10 O.L.R. 193, or whether he should have held, as he did, that he was bound by that decision to take no further steps. The same question between the same parties came before another Divisional Court, and it was held that the former decision was final. And unquestionably no appeal lies to this Court from a decision of a Divisional Court on an appeal from a county or district Judge under the Rivers and Streams Act, R.S.O. 1897, ch. 142.

The later decision of the Divisional Court having been given in an action in the High Court did come before this Court by way of appeal and was affirmed, but for reasons appearing in the report, 12 O.L.R. 163, it was not necessary to deal with the question now sought to be raised.

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In the present case it was conceded that if the learned district Judge, instead of refusing an appointment had issued one, and on a hearing had refused to fix a rate, this Court would have no jurisdiction in appeal.

The appeal, if any, from his order or judgment must have been to a Divisional Court. What good reason can there be for supposing that a third Divisional Court would take a view contrary to that already taken?

That being so *cui bono*? "Ought we," asked Lord Denman, C.J., in *Rex v. Bateman* (1833), 4 B. & Ad. 552, at p. 553, "to grant the mandamus if we see that the party will ultimately fail?" And a mandamus ought not to go merely to correct an error in procedure, even if one has been committed, which is by no means apparent, when the final result on proper procedure would be the same.

As between the real litigants in this matter the question has been twice dealt with and determined, and the matter should be allowed to rest there.

The appeal should be dismissed.

OSLER, J.A.:—I agree in the result and substantially for the reasons given by my learned brother Mabey in the court below.

GARROW, J.A.:—I expressed at some length my opinion upon what I conceived to be the proper construction of the statute in question, R.S.O. 1897, ch. 142, when the case of this plaintiff against the Ontario Lumber Co. was before us some time ago: see 12 O.L.R. 163. To the opinion then expressed I adhere.

Acting apparently upon, or at all events in accordance with, a suggestion contained in one of the judgments of my learned brethren, and with a view to making this application, the plaintiff since applied to the learned county Judge for an appointment to fix a rate of toll which would be applicable to the years 1902 and 1903. This the learned county Judge refused in these terms: "In view of the decision of the Divisional Court overruling my previous order of January 25th, 1904, for tolls on Post Creek, I do not feel justified in granting an appointment to the Beck Manufacturing Company Limited, contrary to such decision of the Divisional Court."

From this it is apparent that he did not deal with the application at all on the merits, but simply deferred to that part of the judgment

of the Divisional Court which held that there is no jurisdiction to fix a rate except as to the future. If he had entertained the application, and had refused it on the merits, we would of course have had on an application such as this, or otherwise, no jurisdiction. But having refused to enter upon the application at all solely in deference to the judgment of the Divisional Court, it appears to me that this application is well founded and should succeed.

To put the simplest case, if there had been no order or judgment at all by the Divisional Court and the learned county Judge had of his own motion taken the same position, *i.e.*, refused to entertain the application on the ground of want of jurisdiction—his course could certainly have been questioned on an application such as this for mandamus and a writ would have been granted. See *Regina v. The Judge of Southampton, County Court* (1891), 65 L.T.N.S. 320. *Re Ratcliffe and Crescent Mill and Timber Co.* (1901), 1 O.L.R. 331;

How then does the order or judgment of the Divisional Court affect the matter if I was right in my former judgment that that Court acted without jurisdiction in limiting or attempting to limit any order the county Judge might make to the future?

Everything, of course, depends upon my construction of the statute being accepted, for if it is not, if it is the proper conclusion that the Divisional Court had jurisdiction to so limit the order, that is an end of the matter. But assuming as I do that the Divisional Court acted without jurisdiction, it is I think clear that the order is no answer. It could only be, on the footing that the matter is *res judicata* and it was really so put on the argument before us. But it is surely elementary, if anything can safely be called so in law, that in order that a matter should become *res judicata* the Court must have had jurisdiction to make the order or give the judgment in question: *Regina v. Hutchings* (1881), 6 Q.B.D. 300; *Attorney-General for Trinidad and Tobago v. Eriché*, [1893] A.C. 518.

The Divisional Court had, as I have said before, simply the power in appeal to alter, vary or set aside the toll fixed by the county Judge. No one but him could in the first instance fix a toll at all, applicable either to the past, the present or the future. And neither he nor the Divisional Court had anything to do with the question of the liability of anyone to pay such toll, or indeed with anything else than the mere rate. When the application goes back to him, if it does, he may after hearing the matter on the merits,

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refuse the application altogether, or may fix the rate too high or too low. And an appeal will of course lie from what he does to the Divisional Court.

I think the appeal should be allowed and the application granted, the whole with costs.

MEREDITH, J.A.:—No new light has been thrown upon the main question involved in this case, and I have nothing to add to it that is in any sense new, but desire to repeat that that which the statute confers is a toll, and that it is surely too late to make and enforce a toll a day after the fair, not to speak of a week, a month, a year, or years unlimited, after it; and that a fair toll is a toll traverse, that is a toll paid to the owner of land for the use of it, whilst the toll in question is a toll thorough only, that is a toll in respect of improvements made on a highway, and so a toll against common right: see *Beck Manufacturing Co. v. Ontario Lumber Co.*, 12 O.L.R. 163.

It is of course right to say that the proper answer to the main question depends upon a proper interpretation of the enactment. But that is merely taking a step backward, which must be immediately retraced, for the enactment confers a "toll," and we must at least give the Legislature credit for knowing the meaning of the word and for meaning what it said in using it, just as we should if they had used the word compensation instead, which word the appellants desire us to substitute for it, without any sort of reason or excuse, for the whole provisions of the Act are consistent only with the creation and enforcement of a toll, and entirely inconsistent with the creation and enforcement of a right of compensation in the ordinary sense. And the toll which the Act confers is obviously a toll thorough and not a toll traverse. Of all tolls which were ever granted, or created by Act of Parliament—innumerable though they have been—has any one ever heard of such a claim as is made in this case having been made in regard to it, to give it force and effect before it was fixed—before it existed?

Does not this very claim prove itself without the meaning of a toll such as the enactment covers? The application was to fix tolls for the year 1903 only: a tariff is in force as to subsequent years. The Act contemplates the logs, in respect of which the tolls are claimed, being seizable to enforce

payment and makes elaborate provisions accordingly. Here they are not, but have long since ceased to exist; and indeed if such a claim as the plaintiffs make be given effect to there is nothing to prevent it being enforced, that is the tolls fixed and the actions maintained, not only after the logs have passed away, but even after they and the improvements in respect of which the tolls are claimed had long since rotted away, and the means of fixing the tolls have been lost or become obscured.

It is true that the Act gives a lumberman a right to have the tolls fixed, but it does not require him to thus disturb sleeping dogs. That provision is for his benefit, not to impose a duty on him. There may be hundreds or thousands of instances in which no claim to a toll is intended to be made, or has been even thought of, and rightly so. Is he to stir up all such and in effect insist upon them the taking of a toll, or else remain liable to belated action to both fix and enforce it? It is not difficult to suggest a case in which the provision would be beneficial, if not indeed, necessary to him. Take, for instance, a costly improvement in which it was known that tolls would be claimed; it might be necessary to know in the autumn at latest what the tolls would be. The lumberman's whole prospects might depend upon that. The maker of the improvements might purposely delay having them fixed either to prevent others, by reason of the uncertainty, competing in the purchase of logs in the district, or to encourage the purchase by appearing to have no desire to exact tolls in order to be able to exact the more, and then, before the freshets of the following year, have them fixed and exacted at the highest rate, to the upsetting of the lumberman's calculations and to his great loss. In such a case he could apply early or abandon the field. To let him go on for years and then come down upon him is to make something like a trap of the enactment.

The appellant's position is precisely the same as if he had made improvements on a highway of the ordinary kind, which gave him a right to a toll thorough. What would be thought of an attempt to enforce by action "tolls" for the use of that improvement before—not to mention years before—the tolls were fixed and without any sort of notice of any intention ever to demand a toll or have a toll fixed?

I need not again refer to the language and provisions of the Act

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directly indicating the future character of the toll—that is its existence only when fixed.

It ought not to be necessary to add that, if the district Judge had no power to make a tariff of tolls having an *ex post facto* or retrospective effect (the one thing sought upon the application to him) he will not be compelled by mandamus to do so; and I have preferred to deal with this case upon its substantial grounds, namely, whether the Divisional Court was right in holding that he had no such power; and so of giving no excuse for future litigation over that question; but it may be necessary to say that, in my opinion, such a judge must necessarily consider any question as to his jurisdiction, properly raised on the application to him, and may be obliged by the circumstances of some cases to fix different tolls in respect of different periods of the use of the improvement; and that, upon an appeal from him, the Divisional Court has power to reconsider any question considered by, or arising upon the application to, him. It does not, of course, follow that either can, by a misconstruction of the Act, acquire or avoid jurisdiction; and so an application for a mandamus or prohibition might be quite a proper proceeding; and so too any such question might properly be brought to this court and taken further; unless, indeed, the effect of the Act is that the rights and remedies conferred by it are to be sought and obtained only by the special means provided in it, for in such a case the interpretation of the Divisional Court, as the tribunal of last resort, must be considered the true one, unless and until the Legislature enacts otherwise; and there is, perhaps, a good deal to be said in favour of that view of the enactment; but otherwise I cannot understand how the matter can be *res judicata* if the Divisional Court have prevented a fixing of the tolls in question upon a misinterpretation of the enactment: I have, therefore, preferred to deal with the case upon the substantial question raised in it, and would dismiss the appeal accordingly.

G. F. H.

[IN THE COURT OF APPEAL.]

SIMPSON V. TORONTO AND YORK RADIAL R.W. CO.

Street Railways—Accident—Negligence—Evidence—Leaning Over to Expectorate.

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The plaintiff, as a passenger, was, about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—

Held (reversing the judgment of the Divisional Court), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury; MEREDITH, J.A., dissenting.

Per RIDDELL, J. (in the Divisional Court):—While it is impossible to lay down any specific rule for the guidance of railways or street railways generally, a railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco and gum chewers, and if it be the custom of such passengers to put their heads past the lines of the car to expectorate, the railway should be held to know of such custom, and should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act.

The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court.

THIS was an appeal by the defendants from the judgment of the Divisional Court affirming a judgment of MABEE, J., entered at the trial of the action.

The facts are fully stated in the judgments.

The appeal to the Divisional Court was argued on April 16, 1907, before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ.

T. C. Robinette, K.C., and C. A. Moss, for the defendants.

J. T. Loftus, for the plaintiff.

May 20th. BRITTON, J.:—The plaintiff's allegation is that on September 4th, 1905, he boarded a car of the defendants at Long Branch for Toronto, and, as the car was crowded and as

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he wished to smoke, he stood on the rear platform of the car. He leaned back over the wire gate of said car, which was quite low, and in so doing was struck by a post belonging to the defendants, and used by them for their trolley wire. The action was tried by Mabee, J., with a jury, and resulted in a verdict for the plaintiff and for \$500 damages.

I have reached the conclusion that upon the whole case there was evidence of negligence on the part of defendants proper to be submitted to the jury, and that the nonsuit asked for was properly refused.

Upon the evidence the jury could find that the plaintiff's injury was sustained by his head coming in contact with a trolley pole. A pole placed by defendants in such close proximity to the rails upon their line of railway that a person standing upon the rear platform and projecting his head, as would naturally be done, and as plaintiff says he did, for the purpose of spitting, could be injured by that pole, is dangerous, and so placing it is evidence of negligence.

The plaintiff's evidence is that the car was not crowded, nor was the rear platform crowded. The plaintiff stood upon the platform because he wished to do so. Defendants permitted this, and permitted smoking by passengers when there; and the defendants did not permit smoking by passengers on some seats in the car, and they prohibited spitting upon the floor of the car.

That being the case, if the poles are so near to the cars as to be dangerous, the defendants should by a wire netting or in some way so protect or warn passengers as to prevent such an accident as happened in this case.

The case was wholly for the jury, unless it can be held as a matter of law that what plaintiff did was *per se* contributory negligence. I do not think it was. Leaning over the rail and looking out, extending one's hand or arm or any part of the body beyond the car in motion, may be evidence of contributory negligence, and under certain circumstances would be contributory negligence.

I can not go so far as to agree with the decision in *Todd v. Old Colony and Fall River R. R. Co.* (1861), 3 Allen 18, to which we were referred.

In *Spencer v. The Milwaukee and Prairie du Chien R.R. Co.* (1863), 17 Wis. 503 (Vilas and Bryant's notes), it was held

not error for the circuit court to refuse to "instruct the jury that if the plaintiff was sitting with his elbow or arm projecting out of the window, and sustained the injury complained of by reason of that fact, he could not recover." In that case it was held "that it was properly left to the jury to determine, under all the circumstances of the case, whether the plaintiff was guilty of negligence in respect to the position of his arm."

In *Francis v. New York Steam Co.* (1886), 1 N.Y. State Reporter, p. 261, it was held by the New York Common Pleas (Allen, J.) that to have the arm out of the window of a street car is not negligence *per se*, and whether negligence or not depends upon the circumstances of the case.

In *Holbrook v. Utica and Schenectady R.R. Co.* (1855), 12 N.Y. 236, 244, the Judge charged the jury that it was for them to say whether the plaintiff's arm was out of the window at the time of the injury, and if it was that was a circumstance from which they might infer negligence or want of ordinary care on her part. The Judge was requested to charge that if the jury found that the plaintiff's arm or elbow was outside the window of the car, it was an act of negligence, and she could not recover. The Judge refused to so charge, and the Judges of the Court of Appeal were unanimously of the opinion that the trial Judge was right, and that he had properly directed the jury.

The defendants were, no doubt, taken at a disadvantage by the plaintiff having changed the location of the accident from that given by him upon his examination for discovery, but that was rather a ground for postponement of the trial than ground for a new trial.

As to damages, no doubt the jury estimated them very liberally as against these defendants, but the amount can not be considered so unreasonable or so excessive as to afford ground for a new trial as of right.

In view of the fact of the place of accident not having been correctly stated by plaintiff in his examination for discovery and the amount of the damages being large for the injury actually sustained, I think the appeal should be dismissed without costs.

FALCONBRIDGE, C.J.:—There is only one point in the case, viz., whether a passenger is disentitled to recover by reason of contributory negligence for an injury received through having any

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part of his body projected beyond the outside edge of the structure of the car in which he is being conveyed.

The point has not arisen in England or in Ontario. The authorities in the United States are in conflict.

My brother Riddell has carefully exploited the leading American cases. After collating and considering these, the only matter which has weighed on my mind to "give us pause" was the *dictum* of Mr. Beven (Negligence, 2nd ed., vol. 2, p. 1204), that "in England . . . there is no reason to doubt that the Massachusetts rule would be adopted."

It is with great diffidence that one ventures to dissent from the opinion of so eminent an authority.

But we have all come to the conclusion that the Massachusetts rule ought not to be adopted here, and that the question is one for the jury.

The appeal will be dismissed but without costs, for the reason given by my brother Britton.

RIDDELL, J.:—The plaintiff was about midnight of September 4th, 1905, riding upon a car of the defendants coming from Long Branch to Sunnyside. He was standing at the back, upon the platform, smoking a cigar, and leaning upon the grating with his elbow, the grating being of convenient height. He leaned over the side from time to time, and expectorated on the street. While doing this, he was struck by something, rendered unconscious, remaining so for about three days, and, in consequence of the blow, suffered considerably for about six weeks, and still feels the effects. He brought an action, which was tried before my brother Mabey, with a jury, at the assizes in Toronto in February, 1907. A general verdict was rendered for the plaintiff, with damages \$500.

The defendants now appeal.

Upon the motion before us it was argued that there was no evidence of the cause of the accident; that there was no evidence of negligence on the part of the defendants; that the conduct of the plaintiff was itself contributory negligence in law; and that the Judge's charge was erroneous. A new trial was asked for, also, on the ground of surprise.

Had the defendants rested with the case as presented by the

plaintiff, I think the motion for a nonsuit should have been granted. I do not think the facts as established by the plaintiff's evidence shewed even a *prima facie* case of negligence. That simply shewed that, riding on a car of the defendants, and projecting his head a short distance beyond the side of the car, the plaintiff received a blow from some source. There was no evidence that this blow came from a pole or that there was any pole near the track. No doubt, if anything happened to the car itself, such as running off the track, the principle of *res ipsa loquitur* would apply, but there was nothing of that kind here, and I do not think that principle could be extended here so as to throw upon the defendants the onus of proving non-negligence on their part.

But it is not necessary to pursue that inquiry further, as the evidence adduced by the defendants takes the case very much further. It was proved that some months after the accident the defendants, upon trying a snow plough, which projected over the rails one foot, "pretty near," further than this car, found it necessary to move back some of the poles to allow for the overhang, that this was done on the north side of the track (the accident occurred on the north side), and that about twenty poles had to be moved in the five miles west of Nurse's Hotel; none, as the witness says, however, nearer the Humber than "possibly half a mile or three-quarters of a mile." The plaintiff says he was injured about one hundred yards west of the Humber, but says that his ideas as to where the accident happened are very hazy outside of what his witnesses told him. Thompson says that the accident took place about half a mile the other side of the Humber, so far as he could judge—half a mile west of Nurse's Hotel—and both Thompson and Miss Farrell say the accident took place on a curve. There was ample evidence upon which a jury might find—and had I been trying the case I should have found—that the accident took place upon this curve—Hick's curve—that at that point there was a post certainly within one foot, and perhaps much less, of the car, and that this it was which struck the plaintiff's head. The plaintiff's evidence is that his head was protruding three or four inches; though he thinks not five or six or seven inches; and no other cause can reasonably be suggested which would occasion the accident. I do not think this is a mere guess or conjecture.

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The question of negligence of the defendants and contributory negligence of the plaintiff must, as stated by my brother Britton on the argument, be taken together. By the defendants it was urged that it is negligence *per se* for a passenger to put his head or any part of his body beyond the side of the car, and that the railway company cannot be held bound to provide that, in case he acts thus negligently, there shall be no obstruction near enough to hurt him.

No doubt there is a considerable body of authority in the courts of some of the United States going the full length claimed by the defendants. And, while we are not bound by such decisions, we welcome the assistance they afford in arriving at principles of law which may well be considered equally applicable to two peoples living in a similar state of society and material advancement, and under systems of government and law not in their essence dissimilar.

Most of the cases will be found collected in Elliott on Law of Railroads, 1897 ed., sec. 1633. See now the second and much-improved edition of 1907, s. 1906, C.Z. and elsewhere. Several others were cited to us by counsel for the defendants upon the argument. It may be of advantage to quote from a few of these.

It was held in a case in Massachusetts, *Todd v. Old Colony and Fall River R.R. Co.*, 3 Allen 18, 80 Am. Dec. 49 (Supreme Judicial Court of Massachusetts): "If he (the plaintiff) was then riding on the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him from maintaining his action. Looking at the mode in which railroads are constructed, with posts and barriers, which are placed very near to the track on which the cars are to pass, the rapid rate at which trains move, the manner in which cars are made, with seats to accommodate passengers so as to avoid any exposure of the body or limbs to outward objects in passing, we can see no ground on which it can be contended that a person, in travelling on a railroad, is exercising reasonable care in placing his arm in such a position that it protrudes from a window, and may come in contact with external obstructions. Certainly, if it is a want of due care to attempt to leave a car when a train is in motion, although going

at a slow rate of speed, as has been heretofore determined by this Court, it is no less a want of proper care to ride in a car with an arm or leg exposed to collision against passing trains or the necessary obstructions on the sides of the track" (pp. 51-2). It is in referring to this case that Mr. Beven, in his admirable work on Negligence in Law, 2nd ed., vol. 2, p. 1204, says: "The point has not arisen in England, where there is no reason to doubt that, should it, the Massachusetts rule would be adopted."

In *Bridges v. Jackson Electric Railway Light and Power Co.* (1905), 38 So. Rep., 788, 39 Am. & Eng. R.R. Cas. (N.S.), 512, a passenger left his seat and went and stood on the car platform, and then, when the car was running, he attempted to regain his seat by way of the running board, and this was held to be contributory negligence. It was also considered that there is no duty imposed on street railways of preventing their passengers running unnecessary danger.

In *Favre v. Louisville and Nashville R.R. Co.* (1891), 16 S.W. Rep. 370, 91 Ky. 541, it was held that for a person in a rapidly moving railway train to permit his hand to protrude from a window of the car in which he is sitting is such contributory negligence as to prevent his recovering damages for injuries received by its striking some object outside, following *Louisville and Nashville R.R. Co. v. Sickings* (1868), 5 Bush. 1, in the same court, holding that such an act, even though the arm was but a very short distance beyond the window, was gross negligence.

Huber v. Cedar Rapids and M.C. R.W. Co. (1904), 35 Am. & Eng. R.R. Cas. (N.S.) 768, 100 N.W. Rep. 478, decides that where a passenger on a street car, while standing on the platform, leaned over a railing for the purpose of seeing where certain smoke came from to such an extent that he was struck by a trolley pole located from fourteen to seventeen inches from the side of the car, and from nineteen to twenty-four inches from the railing, he was guilty of contributory negligence as matter of law.

The Court, speaking of the usual and obvious perils for which one on the platform of a car must look out, says (p. 770):—"Probably the danger from too close proximity of the trolley pole is not to be included among these perils, for passengers have the right to assume that the road has been so constructed as to obviate collisions therewith in the ordinary course of travel, and are not

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required to keep a look-out for such poles. . . But it does not follow that these poles must be placed beyond the reach of passengers. A passenger is held not to be negligent, as a matter of law, in allowing his hand or part of his arm to protrude from a street car window: *Dahlberg v. Minneapolis Street R.W. Co.* (1884), 32 Minn. 404; *Seigel v. Eisen* (1871), 41 Cal. 109; *Summers v. Circuit City R.R. Co.* (1882), 34 La. Ann. 139; *Miller v. St. Louis R.R. Co.* (1878), 5 Mo. App. 471; *Germantown Passenger R.W. Co. v. Brophy* (1884), 105 Pa. 38. But it is only when this is incident to his position in the car, and we have discovered no case in which voluntarily extending the arm any considerable distance beyond the surface of the car, or protruding the head through the window, has been treated otherwise than as negligence *per se*. Everyone appreciates the danger of exposing any portion of the person beyond the sides of a rapidly moving car, and, when voluntarily done, the current of authority is to the effect that it is such negligence as to preclude recovery for the injury received: *Benedict v. Minneapolis & St. Louis Ry. Co.* (1902), 90 N.W. 360, 86 Minn. 224. The distinction is illustrated in *Cummings v. Worcester, Leicester and Spencer Street R.W. Co. (Mass.)* (1896), 166 Mass. 220, where a passenger was riding on the front platform or steps of a closed car. He claimed that he had one foot on the step and the other on the platform facing it, and that he happened to turn his head in the direction the car was moving, when he was struck on the face by a post; while the evidence of the defendants tended to shew that he was facing the street, with both feet on the lower step, his left hand on the dasher rail, and his right hand on the body rail, intentionally leaning out beyond the car, and looking back in the opposite direction from which it was going. Instructions to the effect that 'a casual or momentary leaning out, such as would be incident to securing a more comfortable or safer position, would not necessarily preclude him from recovery,' but that, if he was in the position described by the defendants' witnesses, deliberately leaning out beyond the car line and looking back when struck, he was negligent as a matter of law."

Indianapolis and Cincinnati R.R. Co. v. Rutherford (1867), 29 Ind. 82. A passenger put his arm several inches outside of the window, and it came in contact with a water tank. Held, contributory negligence as matter of law, following *Todd v. Old Colony and Fall*

River R.R. Co., 3 Allen 18; Elliott on Railroads, 1897 ed., sec. 1633; *Catawissa R.R. Co. v. Armstrong* (1865), 49 Penn. 186, the decision in the latter case not being in point in this discussion.

Pittsburg and Connellsville R.R. Co. v. Andrews (1873), 39 Md. 329. If a passenger of mature years voluntarily or inattentively projects his elbow or arm out of the window of a railroad car in which he is travelling, and it is injured by coming in contact with a freight car standing on a siding near the main track of the railroad, he is not entitled to recover damages for such injury. The placing of his arm out of the window is an act of contributory negligence, and the Court should so instruct the jury as matter of law.

This case discusses many of the cases theretofore decided in the State courts, and mentions one in which the contrary doctrine was held. In *Spencer v. Milwaukee and Prairie du Chien R.R. Co.*, 17 Wis. 488 (503), it was held (p. 493) that "it is a matter of fact whether a person riding in a railroad car and placing his arm upon the window base, even if it extends slightly outside, does so in a manner hazardous and dangerous under the circumstances, or whether he exercises all proper and reasonable care and attention to his personal safety. It is incumbent upon him, of course, so to conduct himself as not to expose his limbs to collision from obstacles outside. The party must be entirely free from negligence which contributes to the injury, and it was for the jury to say, under all the circumstances, whether the plaintiff was wanting in care and attention or not." The Court (pp. 493, 494) goes on to consider if it could be laid down as matter of law that a passenger is chargeable with negligence who extends his arm or hand in the slightest degree out of the window; and then says (p. 494): "There is always more or less space between the outside of the car and any structure erected by the side of the track, and must necessarily be so, to accommodate the motion of the car. Passengers know this, and regulate their conduct accordingly. They do not suppose that the agents and managers of the road suffer obstacles to be so placed as barely to miss the car while passing. . . . Of course, a case might be supposed where carelessness would be clearly apparent from the circumstances. If a passenger should ride with his body half out of the car or with his arms or feet so protruded that they would

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inevitably expose him to danger and collision, we should have no hesitation in saying that he was utterly reckless." The Court also holds "that the rule laid down in the case of *Todd v. Old Colony and Fall River R.R. Co.*, 3 Allen 18, is . . . contrary to the weight of authority and unsound in principle."

Christensen v. Metropolitan Street Ry. Co. (1905), 137 Fed. Rep. 708; 41 Am. & Eng. R.R. Cas. (N.S.) 250. Screens with large meshes, fastened across the lower half of the windows of a street car on the side next the poles supporting the trolley wires, are a sufficient protection against the accidental injury to passengers from such poles, and a sufficient warning of the danger of such injury to absolve the railway company from the charge of negligence in that regard. And a passenger in a street car who, on account of sudden illness, extended her head through a window above a screen which covered the lower half of the window, and was injured by striking against a trolley pole beside the track, being obliged, in order to so reach the window, to stand up or kneel upon a seat, was chargeable with contributory negligence as matter of law. At 41 Am. & Eng. R.R. Cases, at p. 254: "The company was not required to anticipate that the plaintiff might become ill and attempt to put her head out of the window, when it would be impossible for her to do so without turning about and either kneeling or standing on the seat."

It will be seen that the decisions are not uniform; it will also appear that many of the decisions derive ultimately from the *Todd* case. That case and many other cases in the same sense are decisions of Courts in which the law is also laid down that it is negligence *per se* for a passenger to attempt to leave a moving train. Our Courts have refused to follow these Courts in that decision: see *Keith v. Ottawa and New York R.W. Co.* (1902), 5 O.L.R. 116. Many of the cases will be found on p. 119 of that report, and many more, I think, in the printed appeal book. And while I feel very great regard for the opinion of Mr. Beven, as well as profound gratitude to him for his excellent text-books, I do not think it would be wise to act upon the conjecture of any text writer, however eminent, as to what the Courts in England would probably decide.

The case seems to be without authority by which we would be bound, and it must, therefore, be decided upon principle. The

decision in the Wisconsin case cited above recommends itself to my judgment. It seems to me impossible to lay down any specific rule for the guidance of railways or street railways generally. In some railways—for example, those whose object, or one of whose objects, is to take passengers through scenery—it must be expected that passengers will lean out to look back or forward; some railways which permit, if they do not invite, overcrowding, which compels some to stand on the steps and project part at least of their frame beyond the line of the car, must expect this to happen, and guard accordingly. A railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco or gum chewers, and if it be the custom of such passengers to put their heads past the line of the car in order to expectorate—whether this is due to the prohibition against spitting in the car or some lingering remains of common decency—the railway should be held to know of such custom. And in every case a railway company must take all reasonable precautions against an accident happening to one who is acting as, in the ordinary course of affairs “in the vicinage,” it may be expected that some will act. By “ordinary” I do not mean happening always—or every minute, or every hour, or every day, perhaps not every week—but as likely to occur from time to time.

It is a matter of common knowledge that tobacco chewers are to be found from time to time upon street cars, that some of them at least are decent enough to get rid of their superfluous saliva over the side of the car, and that, in doing so, they may sometimes be expected to project the head some distance beyond the line of the car. If we are not judicially to say that this is common knowledge, at least it would be a question for the jury. This being so, it seems to me that the company must take means to prevent the occurrence of an accident to a person thus acting. If, for no reason that can be suggested, posts are allowed so near to the rail as that one acting in this way may be struck on the head, they should be moved back. If, as was suggested during the argument, it be the case of a building which cannot be moved, either the railway must itself be moved further away or, if this be impracticable, a screen should be placed so as to prevent the head being protruded, or at least some warning should be given.

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A screen reaching up to the elbow of a man standing on the platform, so far from being a warning, seems to me, using common knowledge of human nature and human practices, rather to hold out an invitation to lean over it than a warning to keep away from it. At all events, that is for the jury. And what I have said about the tobacco chewer applies to the tobacco smoker. Many, no doubt, would like to see tobacco smoking abolished, but, so long as it is lawful and usual, so long must the railway companies consider it. If, as is, I think, common knowledge (if not, it is for the jury), smokers sometimes and ordinarily expectorate and that over the line of the side of the car, the railway companies should either remove all obstructions from the side of the track a sufficient distance so as to avoid the probability of an accident, or they should prevent the passengers from projecting their heads over the side, or at the least give proper warning as to the danger.

There was ample evidence upon which the jury could, as they did, find the cause of the accident to be the negligence of the defendants. In this case the extent to which the head of the plaintiff was projected was not such as to make his act negligence *per se*, and it was rightly left to the jury to say whether his act, under the circumstances, was negligence at all.

It was argued that the plaintiff could not have been struck by a post, as a post that would strike his head would also strike the top of the car. To this the answer is apparent. Supposing that the post were vertical, the car would not be struck at all, while if the post was close to the car any projection from the side of the car would be struck. If, as contended, the posts were planted eighteen inches from the line of rail, it is apparent that the head being seven feet and the top of the car ten feet from the rail, if the post at the bottom was on the same horizontal plane as the rail, at the height of the plaintiff's head—to touch the top of the car three feet higher—the post need not be within five and a half inches of the side of the car. And if, as is indicated in the plan, the post was planted two feet below that plane, the track being elevated above the ground, this would be a distance of four and a half inches. This argument, it seems to me, proves nothing except, perhaps, that the plaintiff could not or did not distinguish accurately the distance his head projected; and, perhaps, it was really “four or five inches,” instead of “three or four inches.”

I cannot find anything in the charge of the learned Judge (fairly read) that is objectionable, and no objection was taken at the trial: *Fitzpatrick v. Casselman* (1869), 29 U.C.R. 5; *Regina v. Fick* (1866), 16 C.P. 379. Of course, the fact that no objection was taken at the trial is not in all cases conclusive against the application, but it is so ordinarily.

It is true that the trial Judge plainly shewed, in his remarks to the jury, that he thought the plaintiff entitled to their verdict. A trial judge has the right to do this if he sees fit: *Dougherty v. Williams* (1872), 32 U.C.R. 215; *Scougall v. Stapleton* (1886) 12 O.R. 206; see *per Galt, J.*, at pp. 208, 209.

It sometimes is his duty to give the jury the advantage of seeing how the evidence has affected his mind, although it is not in practice very frequently found necessary to impress upon the jury the merits of an action against a railway company charged with negligence. All that, however, is for the trial Judge.

Then it is said that the defendants were taken by surprise, because, as is alleged, upon the examination for discovery, the plaintiff said the accident had happened a short distance west of the Humber, and therefore the defendants had caused their engineer, Green, to examine as to the position of the posts for only about one-third of a mile west of the Humber. This same evidence was given by the plaintiff at the trial, and it was not apparently till near the close of the evidence that the witness Thompson said that the accident took place about half a mile west of the Humber. No application was made to the learned trial Judge for a postponement, and nothing was said about the alleged surprise at the trial at all. The defendants went on and took their chances of a verdict. We are told that they did not see the full significance of the evidence till the learned Judge was delivering his charge—at all events, nothing was said as to any surprise. I am of opinion that it is the duty of any party to an action who claims he has been taken by surprise to apply to the trial Judge for an adjournment. It may often happen that the evidence complained of may be withdrawn, or a reasonable time given to investigate, and, if possible, meet it. Where a party deliberately stands by, says nothing about being taken by surprise, and takes his chances of a verdict, I think it would require a very strong case to be made out to induce a Court to grant the application when he

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comes afterwards to ask for a new trial. Here I do not think any case is made out at all. All that Green did was to examine the position of the poles as they stand now, and that is all that it is suggested he would have done had the information of the defendants been more accurate. He does not know anything as to whether the poles are the same as at the time of the accident. Wilson is the only one apparently who knows anything about the matter of removal of the poles, and he was, at the trial, examined and cross-examined. If any question was omitted that ought to have been asked, that is the misfortune of the defendants, but no ground of surprise or for a new trial. It was apparent before the close of the evidence at what point it would be contended the accident took place, and if Wilson could have given any evidence which would assist the defendants, he should have been asked. It is, I think, apparent that he could not; his recollection is too indistinct.

The verdict is not large, and, so far as I can see, the merits of the case are not with the defendants. It must, also, be apparent that if, after the evidence already given, it were attempted by the defendants to make out that no change was in reality made and no poles taken out at about half a mile from the Humber, the attempt would be practically hopeless.

The appeal should be dismissed, but without costs, for the reason given by brother Britton.

The defendants appealed from the above judgment, and the appeal was argued on November 15th and 18th, 1907, before Moss, C.J.O., and OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and *C. A. Moss*, for the appellants, contended that there had been no legal negligence on the part of the defendants; that a railway company was under no obligation to place its poles further away than was necessary to give a fair clearance; and that the plaintiff had been guilty of contributory negligence. He cited *Beven on Negligence*, 2nd ed., p. 1204; *Pittsburg and Connellsville R.R. Co. v. McClurg* (1867), 56 Penn. 294; *Interurban Railway and Terminal Co. v. Hancock* (1906), 78 N.E.R. 964; *Dun v. Seaboard and Roanoke R.R. Co.* (1884),

78 Virg. 645; *Holbrook v. Utica and Schenectady R.R. Co.*, 12 N.Y. (Kernan) 236; *Richmond and Danville R.R. Co. v. Scott* (1892), 88 Virg. 958; *Fahner v. Brooklyn Heights R.R. Co.* (1903), 86 App. Div. (N.Y.) 488; *Farmer v. Grand Trunk R.W. Co.* (1891), 21 O.R. 299; *Sias v. Rochester R.W. Co.* (1897), 18 App. Div. (N.Y.) 506; and contended that, in any event, there should be a new trial.

Loftus, for the plaintiff, contended that the plaintiff had a reasonable excuse for leaning out and acted at the time of the accident in a reasonable and orderly manner, and was entitled to damages without being bound to shew the exact cause of the accident: *McArthur v. Dominion Cartridge Co.*, [1905] A.C. 72; *Fenna v. Clare & Co.*, [1895] 1 Q.B. 199; *Snell v. Toronto R.W. Co.* (1900), 27 A.R. 151. He also referred to Booth on Street Railways, sec. 360; *Spencer v. Milwaukee and Prairie du Chien R.R. Co.*, 17 Wis. 488 (503); *Todd v. Old Colony and Fall River R.W. Co.*, 3 Allen 18.

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Hellmuth, in reply.

January 22. GARROW, J.A.:—Appeal by the defendants from the judgment of a Divisional Court affirming the judgment at the trial in favour of the plaintiff before Mabey, J., and a jury.

The action was brought to recover damages caused to the plaintiff while a passenger on the defendants' electric street railway.

Two acts of negligence are alleged in the statement of claim, one that the grate or grating, as it is called, on the rear of the car was so low as to induce passengers to lean on it; the other that the defendants had placed and maintained a trolley post or pole so near the car that a passenger so leaning on the gate would be struck by it. As will appear, the first ground is of no consequence unless the second is also established. Three witnesses were examined on behalf of the plaintiff, namely, the plaintiff himself, one Harry Thompson, and Miss Mabel Farrell.

The accident occurred some time after midnight on September 4th, 1905. The plaintiff had been conducting a dancing class that day at Long Branch, a resort some miles to the west of the city of Toronto. The witness Harry Thompson supplied the music for the dancing, and Miss Farrell had apparently been

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in the plaintiff's company all day, and they were all returning by the last car to Toronto. The car was not crowded. It was what is known as an open car. Harry Thompson and Miss Farrell, with one or two others, were seated on the rear seat, and the plaintiff was standing near them on the north side of the car, leaning on the grate and smoking a cigar, and, as he says, occasionally expectorating over the side of the car, for which purpose he protruded his head beyond the line of the car a distance not exceeding five or six or seven inches, and while doing so was struck by what he supposed was a trolley pole, knocked senseless, and fell back among those who were sitting down.

The night was dark. The plaintiff saw no trolley poles, was not looking out for them, although he knew the track well, and had travelled over it many times. No one else was standing. He stood because he desired to do so, not because it was otherwise necessary. When he last remembers they were near the Humber. When examined for discovery he had been more specific. At that time he said he was struck "down near the Humber," "very near the end of the run, two posts away from the store at the Humber—a little way from the hotel." This portion of his deposition was put in at the trial by the defendants.

Harry Thompson said he was sitting at the rear of the car. It was too dark to see the posts.

"Q. Do you know what it was that struck Simpson? A. I never seen what struck him but I should judge it would be the post. He fell back on us—that is all I know; the only thing that could strike him."

In cross-examination he was asked:

"Q. You were not paying any particular attention at the time to anything that occurred? A. No, we never dreamed of anything happening. } We were just talking and laughing there.

"Q. The first thing you knew was when Simpson fell over? A. Yes.

"Q. You did not feel any jolt or any swing, or anything of that sort? A. No; just fell right back.

"Q. Your way of accounting for it is to suppose there was a swing or a jolt? A. I do not know; we were sitting there, and he fell back on us—that is all I know."

He also said that at the time they were passing over a curve but he could not or did not identify the locality of the curve or otherwise in any way define the locality of the accident.

Mabel Farrell said she was sitting at the back of the car where the plaintiff was; the fourth from where he was standing.

"Q. Then what happened? A. I do not remember. I was sitting at the back of the car. I saw Mr. Simpson fall back. I do not know what struck him. I do not remember what struck him; it was kind of dark and my back was kind of turned to him."

No one was called to prove the position of the trolley poles along the track, and, indeed, except inferentially, and as much from the questions as from the answers, there was really no evidence that there were such poles. And there certainly was a total absence of any kind of evidence to prove or from which it might reasonably be inferred that there was a trolley pole so near the track as to have caused the injury.

Under these circumstances, at the close of the plaintiff's case, which consisted of the evidence to which I have referred, counsel for the defendants moved for a judgment of nonsuit, when this took place:

"Mr. Moss: I move for nonsuit. I submit there is no evidence of any negligence of any kind.

"His Lordship: Why not?

"Mr. Moss: In what way?

"His Lordship: A man riding along on a street car gets hit by something. I should think it was a clear case of negligence of some sort.

"Mr. Moss: In this case, if he was struck by a trolley pole, the plaintiff knows the poles are there. He has ridden over there for weeks and years, and he knows it is a dangerous thing to stick his head over.

"His Lordship: That would be contributory negligence, and that would have to go to the jury.

"Mr. Moss: If that is your Lordship's view.

"His Lordship: I should not think the thing was arguable at all. Is a man liable to get his head knocked off every time he puts it outside of a street car?

"Mr. Moss: If he puts it out the wrong side.

"His Lordship: Either side he puts his head out?

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"Mr. Moss: He might strike a waggon.

"His Lordship: If you shew he struck a waggon?

"Mr. Moss: There is no evidence before your Lordship to shew he struck a pole?

"His Lordship: *I know, but he struck something.*

"Mr. Moss: There might be any obstacle there that might strike him, and we cannot guarantee that he won't be struck by either passing objects or falling objects, or anything of that sort. The plaintiff has to shew some negligence to bring the accident home to us in some way.

"His Lordship: You will have to go farther than this court."

And thereupon several witnesses were examined on behalf of the defendants, and, among others, a civil engineer, Mr. Green, and a Mr. Wilson, an officer of the defendants. Mr. Green, apparently acting on the definition of the locality of the accident given by the plaintiff in his examination for discovery, deposed that he had made an examination and measurement of each trolley post from the store at the Humber westerly for about one-third of a mile, and he produced and proved a plan shewing the exact situation as he found it. From this plan it appears that the nearest post to the track on the north side is distant three feet six inches, and that the clearance, after allowing for the overhang of the car over the rail, would be two feet.

As reliance was placed both at the trial and in the Divisional Court upon Mr. Wilson's evidence as having eked out the meagre case of the plaintiff, it may be useful to set out exactly what he said upon the question of the posts, the only real point in the case. Mr. Wilson said:

"Q. Have you examined systems in other districts? A. Yes.

"Q. What do you say as to the distance of three feet six inches for the trolley pole from the outside of the track? A. That is standard construction.

"Q. What about one foot six overhang for the body of the car? A. That is less in most cases. We have new cars out on that line at the present time which have a greater overhang than that—up to one foot nine and a half inches—and our snow plough is two feet three and a half inches overhang.

"Q. Has there been any change in the location of the poles in this region since the accident? A. No, sir. Some of the

curves,—when we purchased our snow plough a year ago, in making a trial, we found it necessary to move back some of the poles to allow for the overhang.

“Q. Whereabouts would that be? A. I cannot pick out the exact pole, but it was along; there were some between Sunnyside and the Humber, two or three there; there were twenty-four poles moved in the six miles; there were two or three by the Humber.

“Q. Which side of the Humber? A. Between Sunnyside and the Humber; the east side of the Humber.

“Q. I am speaking of the west side? A. There was nothing there inside of what we call Mr. Hicks’ reverse curve going up the hill—possibly half a mile or three-quarters of a mile from this point.

“Q. What point? A. From the point of the Humber.”

Cross-examined by Mr. Loftus:

“Q. What caused you to move those poles? A. The fact that the rotary plough we purchased is wider than any car we have, and it interfered, in going around the curve, with the pole, as it had a large hood, a hopper on the front for taking up the snow, which is very wide.

“Q. How much wider than a car is this plough? A. It is a foot wider.

“Q. And that interfered with the post? A. On certain curves.

“Q. It extends six inches out on each side further than the car? A. No, on one side.

“Q. You said it was a foot wider? A. Yes, on one side. I am speaking of the cross-section of the car. It is over ten feet wide, the whole plough.

“Q. You say this is two feet wider than the car? A. I do not know the exact measurement, but it is pretty near that.”

In reply, the witness Thompson was recalled, and was allowed, in answer to counsel for the plaintiff, to state that the accident took place half a mile west of the Humber, thus, for a very obvious purpose, materially shifting to the west the *locus in quo* as defined by the plaintiff. This was not properly evidence in reply at all, and should not, if objected to, have been received. The place of accident was a necessary part of the plaintiff’s case, and all his evidence on the subject should have been given in the first instance. The plaintiff himself had, as before pointed out, in

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his examination for discovery, defined the locality, and the defendant's evidence was quite naturally and properly directed to meet and cover the ground thus defined. Objection of a kind was taken to the evidence, but only after the improper question had been asked and answered:

"Mr. Moss: I think this witness was all over this.

"His Lordship: I thought he said that in chief.

"Mr. Moss: I do not understand he said half a mile west of the Humber—it was west of the Humber."

He had not, in fact, so far as the printed case shews, said a word in his former evidence as to where the accident occurred, whether east or west of the Humber; the nearest attempt at definition having been his statement that at the time the car was going round a curve. At the close of the whole case defendants' counsel renewed his motion for a nonsuit, which was again refused, and the case submitted to the jury without questions. A general verdict was rendered for \$500 damages in favour of the plaintiff, for which he has judgment.

The view of the facts in evidence taken by the learned trial Judge will best appear from the following extract from his charge: "What was it that the plaintiff hit his head against? The plan produced shews that all the trolley poles west of Nurse's are on the north side of the track. It was on the north side of this car that the plaintiff was standing when he was struck. The defendants say it could not have been, or, in all likelihood, it was not, one of our trolley poles, because they are such and such distance from the track. You heard the figures given by the engineer, and you may take the plan with you when you retire; the distances are marked upon it. The exact location of the accident is in doubt. If the evidence of the conductor is to be accepted, the man was not hurt till after they left Nurse's, coming east. If the evidence of those who saw the man fall is to be accepted he was hurt some distance west of the Humber stopping place at Nurse's. You may consider that it is not at all unreasonable that the plaintiff and those who were sitting near him could not locate the point of accident with much certainty. Doubtless, when he received this injury and fell upon their laps, their attention would be directed to him and to his injuries, and the only way they could form a judgment as to how far west of Nurse's—

of the Humber—that the injury occurred would be, first, to be able to form some estimate of the length of time that the car took to reach Nurse's from the point of injury and the speed at which the car was travelling. With their attention directed upon this man and the injury he had received, would they be in a position to tell with any exactness at all either the length of time that elapsed or the speed at which the car was running? It may be that this accident took place at a point farther west than shewn upon this diagram. It is a matter of uncertainty as to where the accident did occur. Whether the poles farther west than this plan are located entirely or principally upon the north side of the track, or whether they are near or farther from the track, we have no positive statement except the statement of Mr. Wilson as to the number of poles west of the point in question that they had to remove last winter, when they found they could not work their snow plough by reason of the poles being too close. Was it a pole his head came in contact with? The danger attendant upon the proximity of the pole does not rest entirely upon the statement that a pole is three feet six, or three feet ten, or four feet, away from the track, and you may have noticed that the engineer who prepared this plan and who spoke of the distances north of the track, was not asked whether these poles all stood in a vertical position or not, and a pole might be five feet away from the track, and if it did not stand exactly perpendicular, and if it bent or leaned in the direction of the track, it might be much more dangerous and come much nearer to the body of the car than if it stood only three feet from the track, and stood in an exactly perpendicular position. So that the statement that these poles stood three feet six or three feet eight, without the additional statement that they stood in a perpendicular position, is not of much assistance in deciding the fact whether the poles were, in fact, too close to this trolley car or not.

“Then, if you come to the conclusion that this injury was occasioned by his head coming in contact with the trolley pole, the next question to consider is whether that was a negligent act of this company operating these cars at varying rates of speed, with a pole so close that a man leaning over might strike against it with his head. It is said that they are put at standard distances, whatever that may mean. I do not know that there is

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any positive rule that requires a company to put their poles near or far from their rails, but I take the responsibility of saying that if a railway company operating electric cars or a railway company operating steam cars place their poles or other obstructions so near to their travelling cars that it might reasonably be expected, in the minds of reasonable men, that passengers would strike their heads against the poles or other obstructions, that that would be negligence. People getting upon these cars are entitled to some reasonable protection. I take the responsibility of saying that if this man were not negligent, as to which I will deal in a moment, and he struck his head against a pole that was so close to this running car that it might have reasonably been expected that a passenger would do what he did in standing in his position, that would be negligence of the railway company."

In the Divisional Court each of the learned Judges gave reasons. Falconbridge, C.J., in his brief judgment, does not deal with the facts, but with the law only. Britton, J., dealt briefly with the facts and at some length with the law. Upon the facts, he said, his opinion was that upon the whole case there was evidence of negligence on the part of the defendants proper to be submitted to the jury, and that the nonsuit was properly refused; that upon the evidence the jury could find that the plaintiff's injury was sustained by his head coming in contact with a trolley pole, and that to place a pole in such close proximity to the rails that a person projecting his head in the manner described would come in contact with it was evidence of negligence; that the case was "one wholly for the jury, unless it could be held as matter of law that what the plaintiff did was *per se* contributory negligence, which he did not think it was. And he then referred to a number of cases as to that question in support of that view. Riddell, J., was of the opinion that at the close of the plaintiff's case the defendants' motion of nonsuit should have been granted, but that the evidence given on behalf of the defendants had supplied the deficiency. The learned Judge's remarks upon this subject were as follows:—

"Had the defendants rested with the case as presented by the plaintiff, I think the motion for a nonsuit should have been granted. I do not think the facts as established by the plaintiff's evidence shewed even a *prima facie* case of negligence. They

simply shewed that riding on a car of the defendants, and projecting his head a short distance beyond the side of the car, the plaintiff received a blow from some source. There was no evidence that this blow came from a pole or that there was any pole near the track. No doubt, if anything happened to the car itself, such as running off the track, the principle of *res ipsa loquitur* would apply, but there was nothing of that kind here, and I do not think that principle could be extended here so as to throw upon the defendants the means of proving non-negligence on their part.

"But it is not necessary to pursue that inquiry further, as the evidence adduced by the defendants takes the case very much further. It was proved that some months after the accident the defendants, upon trying a snow plough, which projected over the rails one foot, 'pretty near,' further than the car, found it necessary to move back some of the poles to allow for the overhang, that this was done on the north side of the track (the accident occurred on the north side), and that about twenty poles had to be moved in the five miles west of Nurse's Hotel; none, as the witness says, however, nearer the Humber than "possibly half a mile or three-quarters of a mile." The plaintiff says he was injured about one hundred yards west of the Humber, but says that his ideas as to where the accident happened are very hazy outside of what his witnesses told him. Thompson says that the accident took place about half a mile the other side of the Humber, so far as he could judge—half a mile west of Nurse's Hotel—and both Thompson and Miss Farrell say the accident took place on a curve. There was ample evidence upon which the jury ought to find—and, had I been trying the case, I should have found—that the accident took place upon the curve, Hicks' curve; that at that point there was a post within one foot, and perhaps much less, of the car, and that this it was which struck the plaintiff's head. The plaintiff's evidence is that his head was projecting three or four inches, though he thinks not five or six or seven inches, and no other cause can reasonably be suggested which would occasion the accident. I do not think this is a mere guess or conjecture."

The learned Judge then proceeded to an elaborate consideration of the cases as to whether it was negligence *per se* on the part

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of the plaintiff to protrude his head beyond the line of the car as he described, and agreed with the conclusion of the other members of the court that it was not.

My difficulty is not so much with the law as with the facts. It is conceded apparently that it is not one for the application of *res ipsa loquitur*. The plaintiff was bound to give some reasonable evidence to support the case of negligence which he alleged. He says he was struck by a post placed and maintained too near the track for safety, and yet from beginning to end there is absolutely no evidence of such a post having been in existence. If it was there on the night of September 4th, it was there next morning, and also for months afterwards, for no post was removed until long after the action began. In two weeks the plaintiff had recovered from the injury. When he resolved to bring an action is not stated, but on November 30th following he issued his writ. The post was still standing then. Surely the most obvious thing to do, if an action was to be brought, was as soon as possible to go over the track and locate the post or a post which did the mischief. He was not then limited as to space. Any post at all near the Humber to the west would have done, and it could have been discovered by merely riding over the track in daylight. And if this did not occur to the plaintiff, it is incomprehensible that he was not so advised by his solicitor. Without some reasonable evidence upon this point, how could the plaintiff hope to succeed? Unless upon the conjecture that there must have been a post because he was struck by something on the forehead. Even the plaintiff himself does not, except inferentially, say the blow was from a post. He saw no post nor did any of his witnesses, nor do they know what struck him. The line was not a new one. It had been in operation for years, and many thousands of passengers had, doubtless, passed over it in that time, and no similar accident had ever happened before. This negative fact may prove little, but it certainly made it none the less the duty of the plaintiff to come into court with the necessary evidence to prove the whereabouts and position of the post which he alleges injured him.

In the course of the learned Judge's charge, a juryman very pertinently asked how the plaintiff could from his position be struck in the forehead instead of on the side of the head, to which

his Lordship replied it would depend on the angle at which he was holding his head as to where he came into contact with whatever he was struck by. With this explanation the jurymen was, I suppose, satisfied, for there is no word of a dissenting juror. Now, then, if one may conjecture, why may not another? The blow on the forehead was certainly, under the circumstances, very peculiar. Why may not one conjecture that it was caused by his fall? The only thing that is clear is that he fell from some cause. Is it not quite as probable that in falling among the uncushioned seats he struck his forehead, as that he was struck by a post, which no one has found or apparently tried to identify? The blow, wherever it came from, rendered him unconscious, and it would be no extraordinary thing that the plaintiff would not, on recovering consciousness, be aware of exactly what had hit him. He had, he admits himself, had some beer and some whiskey out of a flask, and he was also smoking a cigar, to which he was not, any more than to the drinking, accustomed, according to his evidence. The car was proceeding rapidly, and a lurch around a curve, with one in the plaintiff's condition and position, might very reasonably account for his fall, without a blow at all, and the fall itself might very well account for the bruised forehead. But, in truth, conjecture, at least on the side of the plaintiff, is out of the question. The exact fact, if it is a fact, could have been proved with very little care. The defendants cannot be held liable except upon reasonable evidence of some definite thing which caused the injury, an element wholly lacking in the case. Mabee, J., in his charge, suggests that the place of the accident is indistinct, that the accident may have taken place further west than the evidence shews, or that some post, although far enough distant at the base, may have inclined towards the track far enough to cause the injury. These suppositions are, with deference, pure conjectures. There is no evidence of a slanting pole, and the plaintiff is surely bound within reasonable limits by his own statement as to where the accident took place. Riddell, J., evidently proceeding upon the evidence of Wilson, reached the conclusion, not of a slanting post, but the more positive one of an actual post in Hicks' curve, placed within one foot, and probably less, of the car, and that this it was which caused the injury. All I can say, and I say it with the greatest deference, is that a most

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careful perusal and re-perusal of the evidence contained in the printed case has utterly failed to shew me a word of evidence to justify such a conclusion. Waiving all objection to the admissibility of Mr. Thompson's evidence in reply, accepting his guess in the dark as implicitly as if he had measured the distance with a surveyor's chain, but also taking, as in fairness must be done, the evidence given by Mr. Wilson, which, it is thought by Riddell, J., helped the case of the plaintiff over the stile, it is perfectly clear that no post whatever was removed for over half a mile west of the Humber, the distance covered by Thompson, in his evidence in reply, which completely seems to dispose of the theory of Riddell, J., that the post in question was one of those removed by Wilson.

There was no case proper for the jury until the plaintiff established, either by direct evidence or by reasonable inference, the existence of a post which could have caused the injury. Of direct evidence there is not a particle, nor is there, in my opinion, unless upon the application of the principle of *res ipsa loquitur*, any evidence from which the necessary inference could reasonably be drawn, with the result that the plaintiff's action fails, and should be dismissed with costs. And the plaintiff should pay the costs of this appeal.

MOSS, C.J.O., and OSLER and MACLAREN, JJ.A., concurred.

MEREDITH, J.A.:—I am unable, by any fair process of reasoning, to bring my mind to the conclusion that this case might properly have been withdrawn from the jury; indeed, the more it is considered, the firmer becomes my first impression that, if the case had been tried by me, I would have reached the same conclusions as those reached by the jury upon all the questions of fact affecting the defendant's liability, except, perhaps, that of contributory negligence.

That the defendants were guilty of actionable negligence, in the placing of some of the poles along their track, seems to me not only obvious, but to be fully admitted by two of their officers, in their evidence at the trial. One of such witnesses—James McDougall—testified for the defendants that he was quite familiar with the mode of construction of such roads on this continent; and that the common distance of the poles from the nearest rail

is three feet six or three feet seven. The other of such witnesses—Charles L. Wilson—likewise testified that, according to “standard construction,” such distance is three feet six. The defendants’ poles generally seem to have been placed in accordance with this rule or standard; but it was, after the plaintiff’s injury, discovered that about twenty-five of them had been misplaced at a less distance, and they were then removed to the proper distance. The negligent placing of these poles within the standard distance seems to have been discovered, or, at all events, brought effectually home to the defendants, by one of their cars—the snow plough—coming so violently in contact with one of such poles that the car was thrown from the track and the pole snapped in twain. As this car is but one foot wider on each side than the car in which the plaintiff was when injured, it is obvious that this particular pole was an offender against the rule as to distance to a considerable extent, for, to bring about the results which followed the collision, the car must have overlapped the pole at least several inches, or there would have been “give” enough in each to have averted such violent consequences. When it is remembered, among other things, that the only way of boarding or alighting from some of the defendants’ cars is at the side, and that the only means of passing from one part of the car to another by the defendants’ servants, or by passengers when necessary, is by means of the stage or foot board at the side, it will be very obvious that some standard or safe distance for placing poles is necessary. This part of the case presents no sort of difficulty.

¶ But it is said that there was no evidence that such negligence was the cause of the plaintiff’s injury; that the plaintiff testified that he was struck “about one hundred yards the other side of the Humber,” and that the evidence for the defence proved that there was no such misplaced pole within a quarter, or a third, of a mile of that side of the Humber. That, however, is very inconclusive; that was not all that the plaintiff said on the subject; and if it had been, it would not prevent a finding to the contrary; a plaintiff is not estopped by any such statement as that; it may have been a mistake; and it is quite open to a jury to give credit to or to discredit such a statement, there being other evidence which might fairly lead them to a different conclusion. But that was, as I have said, by no means all that the plaintiff

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C. A. said on the subject. In his cross-examination, Mr. Moss elicited
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"Q. Your ideas about where the accident occurred are very
hazy now? A. Outside of my witnesses, what they told me.

"Q. You could not tell within a quarter of a mile, of your own
recollection? A. I knew we were near the Humber, the last I
remembered."

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* * * * *

"Q. On your examination you did not tell us about the drink
of whiskey? A. I had just two drinks out of two bottles.

"Q. Your memory is very elusive? A. Anybody got a crack
like I did their memory would be bad."

Everyone knows how very difficult it is for anyone, on a dark
night, to tell just where he is, even in familiar streets, on looking
out of a car, unless he has been looking out for some length of
time, and has grasped or kept track of the "bearings." The
inclination of my mind would be, as that of the jury, no doubt,
was, that it would be safer to depend upon the probabilities of
the case, and the testimony of others, than upon the plaintiff's testi-
mony in this respect, and none the less so because, according to
his uncontradicted testimony, unconsciousness for three days
was the immediate effect of the blow he received.

The other two witnesses for the plaintiff, each of whom was
present when he was struck, testified that the injury was caused
when the car was running on one of the curves west of the Humber,
the witness Thompson saying that it was about a half a mile the
other side of the Humber, as far as he could judge; and when
asked why he said half a mile and not quarter of a mile, he answered,
"I just passed my opinion about it." "It took some little time
from the time he was hurt to go to the Humber, and that is how
I judge it would be half a mile." The other witness, not un-
naturally, was unable to throw any great light on the question,
but was, indeed, less definite. She said, "We saw him fall, and
a couple of the boys picked him up, and the car did not stop for
quite a while after." Upon such evidence, including the positive
statement of the plaintiff that he was struck by one of the poles,
I can find no sort of fault with the jury in "putting two and two-
together" and easily reaching the conclusion that the proximate
cause of the plaintiff's injury was one of the twenty-five poles.

negligently placed by the defendants too near to the track—within the standard distance. I would have had no difficulty in reaching that conclusion if the case had been tried by me without a jury. The suggestion that the plaintiff was struck by some missile hurled at the car is quite too far-fetched. Such a weapon would probably have caused a cut or wound, not a mere abrasion and bruise, and would probably have fallen in the car and have been heard or seen. Its impetus would hardly be completely spent by the impact with the side of the man's head. Nor can I at all agree with Mr. Hellmuth in his contention that the blow could not have been struck where it was by coming in contact with the pole, as the plaintiff testified that it was. It would all depend upon the way he happened to have turned his head at the moment before the impact. All of these things were essentially questions for the jury; and I have not the conceit to imagine that they were not at least quite as competent to understand them, and to find the very truth of the matter, as I am, having the great advantage, as they had, of hearing and seeing the witnesses, and all, also, that transpires at a trial, which it is impossible and impracticable to convey to a Court of Appeal.

So, too, the question of contributory negligence seems to me to have been one for the jury, in the circumstances of this case. I am unable to say that there is no reasonable evidence to support their finding in the plaintiff's favour upon it. The case of a railway such as this is so obviously different from that of what a short time ago might have been called the ordinary railway, and is now very often called a steam railway, that I would not have mentioned it had not the Divisional Court, failed to make any remark upon the difference in giving their reasons for the conclusion which they reached. For the purposes of the subject under discussion there is quite as much difference between the railway in question and a steam railway as there is between this railway and a horse car railway or even a stage coach. Being upon the back platform of the defendants' car, where the plaintiff was when injured, was not only not prohibited, but was invited by the defendants, there being a seat there for passengers, and passengers almost invariably both standing and sitting in such platform, or vestibule, as it is now commonly called. There was nothing to prevent leaning over the rail at the back

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or at the side; the wire guard at the side was placed so low—three feet seven inches from the floor—as to almost indicate that it is unobjectionable to look out, or to lean over, for any such or other ordinary purposes; and there was no warning of any kind against so doing, or of any danger from it; and it was a thing of the commonest occurrence, no wise objected to so far as the evidence shews. There was, therefore, evidence upon which the jury might, in my opinion, have found that what the plaintiff says he did was a thing permitted to be done by the defendants. Why might not a passenger extend his head over the railing from the rear vestibule of such a car? There were no windows nor anything else whatever to prevent it; there was not the ubiquitous cinder, ever seeking a lodgment in a human eye; there were none of the other obvious dangers attendant upon a protrusion of the head through the window of a car in a fast moving train of an ordinary railway, or of standing upon the platform of such a car contrary to the invariable warning against doing so. I am, therefore, quite in accord with the conclusions of the Divisional Court on this question also.

But I am not in accord with their attack upon the law as laid down in the Massachusetts case, which they saw fit to dissent from. It seems to me to have been quite unnecessary for the proper determination of this case to discuss at all the conclusions of the Court in that case upon this question. But, as they have done so, it seems to me to be proper to say that I am at present quite unable to agree with them in the views they expressed regarding it. I would have thought that no one in the possession of ordinary intelligence would protrude either his head or his heels through the window of a swift moving railway train, which might be running at twenty, forty, or sixty miles an hour; that the law of self-preservation would have prevented even those of less than ordinary intelligence or prudence doing so. Car windows are plainly made for no such purpose; and railway companies have a right to assume that those who undertake to travel upon their roads are neither imbeciles nor lunatics with suicidal tendencies. If one has a right to poke his or her head out of the window, or to stand upon the platform, of the cars of such a railway, he or she is, I suppose, entitled to damages for the almost inevitable cinder in the eye consequences; and if entitled to do so with the

head, why not with the feet, which may be tired and long for a bit of fresh air too, and so have damages, too, for the stockings, which might lose their lustre through the smuts from the engine or the mist from its steam.

No defence was raised on the ground that the plaintiff was doing an unlawful act in spitting upon the highway, and that that unlawful act was the cause of his injury; and so any such question cannot be considered.

I am, therefore, firmly of opinion that this appeal should be dismissed; and, indeed, in view of the unanimous findings of the jury, entirely approved of by the trial Judge, and unanimously confirmed in the Divisional Court, and in view of the fact that the amount involved is small, that the costs permitted to be incurred must now largely exceed that amount, and of the other evils of protracted litigation in such a case as this, that no appeal to this Court should ever have been brought. It cannot be satisfactory that the costs of an action such as this should be permitted to exceed the amount involved in it, nor that litigation over it should be protracted, nor that either party should eventually succeed upon the opinions of four Judges against the firm opinions of the five other Judges who have heard and considered the case.

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RE CHAMBERS, CHAMBERS v. WOOD.

Dec. 18.

Will—Construction—Gift of Income—Vesting of Corpus—General Rule—Contrary Intention.

The rule that a gift of income without limitation of time operates as a gift of the corpus, in the absence of other disposition thereof, does not apply to a case in which the testator has expressed an intention that the corpus should not be vested in the donee.

Therefore, where a testator directed by his will that a sum of money should be invested by his executors upon trust to pay the interest to the A. W. hospital in the city of S., for the benefit of poor patients, so long as said A. W. hospital should be used for hospital purposes, and that, in the event of said hospital ceasing at any time to be so used for one year, the interest should be devoted to other charitable purposes:—

Held, that the testator's intention that the corpus should not be vested in or paid to the hospital was sufficiently expressed, and precluded the application of the general rule.

THIS was a motion for the construction of the will of Nelson Chambers, which was argued in the Weekly Court, on the 7th of November, 1907, before ANGLIN, J., in whose judgment the clauses of the will to be construed are set out.

A. E. Haines, for the executors.

W. B. Doherty, for the Amasa Wood Hospital.

J. M. Glenn, K.C., for the corporation of the county of Elgin.

December 18. ANGLIN, J.:—The will of the late Nelson Chambers contains the following provisions:—

“Fourth: I hereby further will and direct that the sum of five thousand dollars be put out at interest in some good and approved security or securities, and kept so invested by my executors hereinafter named in this my will, upon trust, to pay the interest thereof from year to year to the Amasa Wood Hospital of St. Thomas, for the benefit of poor patients from the county of Elgin, who may from time to time become inmates of the said hospital, so long as the said Amasa Wood Hospital shall be used for an hospital. And in the event of the said Amasa Wood Hospital ceasing at any time for one year to be used for an hospital, then that the interest of the said five thousand dollars shall be paid over yearly to the poor house of the county of Elgin, to be expended therein for the benefit of the poor and infirm therein, from the county of Elgin, until the establishment of some other

public hospital in the city of St. Thomas, when the said interest shall be paid to the said hospital, in the same way and for the same purpose as it was formerly paid to the Amasa Wood Hospital.

* * * * *

Sixth: I further direct that all the above legacies shall be paid by my executors within one year after my decease."

The rule is incontrovertible that a gift of income without limitation of time is tantamount to and operates as a gift of the capital in the absence of other disposition thereof. But this rule is subject to the qualification that a testator has the power of giving interest without vesting the corpus in the donee of the interest by expressing such an intention: Jarman on Wills, 5th ed., p. 805.

In the foregoing bequest the testator clearly manifests an intention to provide for the event of the Amasa Wood Hospital ceasing to carry on its work temporarily or permanently. He plainly intends that, should such a contingency occur, the income theretofore paid to the hospital shall be available for other charitable purposes. This involves the perpetuation of the trust of the fund, and sufficiently expresses an intention that the corpus of the fund shall not vest in or be paid over to the hospital trustees.

Mr. Doherty urges that the covenant of the municipality of the county of Elgin for the perpetual maintenance of the hospital, given as a term of its acquisition of the Amasa Wood property, ensures the perpetuity of that institution, and that its work will never be interrupted. While this covenant, of which the testator may have been fully apprised, no doubt renders it highly improbable that the work of the hospital shall cease at any time in the future, that contingency cannot, in my opinion, even with such a covenant, be deemed beyond the realm of possibilities.

If the gift over were to the municipal corporation for its own use and benefit, this fact would certainly afford a very strong argument in support of Mr. Doherty's contention, because, in that event, the municipal corporation would certainly not be allowed to benefit as a result of failure to observe its covenant to maintain the hospital. But the gift over to the municipal corporation is in trust for defined charitable purposes.

The testator's manifest intention that the gift of income to the Amasa Wood Hospital shall not carry with it the corpus, and

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the provision that in a certain contingency—however unlikely to arise—the income itself shall be diverted to other charitable purposes, in my opinion, preclude the application of the rule above stated as to the effect of unlimited gifts of income. An order will issue containing a declaration in accordance with this view. Costs of all parties of this application will be paid out of the estate.

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[DIVISIONAL COURT.]

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 Jan. 31.

LOUGHEAD v. COLLINGWOOD SHIPBUILDING COMPANY.

Negligence, Action for—Indemnity Held by Defendants—Evidence as to—Improper Admission of—New Trial—"Substantial Wrong or Miscarriage"—Con. Rule 785.

In an action by a workman under the Workmen's Compensation for Injuries Act, the plaintiff's counsel was allowed, against the strong objection of counsel for the defendants, to prove the fact that the defendants were indemnified against any verdict that might be given in favour of the plaintiff by a policy of insurance with an accident and guarantee company. The trial Judge warned the plaintiff that he must be prepared to take the risk of submitting the evidence, and, in charging the jury, told them that it should form no element whatever in their decision:—

Held, that the evidence was improperly admitted.

Held, also (ANGLIN, J., dissenting), that, by reason of the admission of the evidence, a "substantial wrong or miscarriage" had been occasioned within the meaning of Con. Rule 785, and that the defendants were entitled to a new trial.

APPEAL by the defendants from the judgment of Mabee, J., in favour of the plaintiff, upon questions submitted to the jury, in an action under the Workmen's Compensation for Injuries Act, tried at Barrie. The facts and arguments are stated in the judgments.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., ANGLIN and RIDDELL, JJ., on 20th November, 1907.

John Birnie, K.C., for defendants.

A. E. H. Creswicke, for plaintiff.

January 31. FALCONBRIDGE, C.J.:—A motion for a new trial. Upon the argument we disposed of all grounds except

one, and that, though I, at least, had little doubt about it, we reserved on account of its great practical importance.

The action is by a workman under the Workmen's Compensation for Injuries Act. During the cross-examination of the manager of the defendant company, counsel for the plaintiff, against the strong opposition and objection of counsel for the defendants, and after being warned by the trial Judge that he must be prepared to take the risk, was allowed to prove the fact that the defendant company was insured against accidents, and that the guarantee company to which the defendants paid their premium had to stand between them and loss.

That this is not proper evidence is clear from such cases as *Flynn v. The Industrial Exhibition Association of Toronto* (1903), 6 O.L.R. 635; and it has been so ruled by myself (and probably by other Judges) over and over again at *nisi prius*.

If, however, it were the ordinary case of improper admission of evidence, the Con. Rule 785 might be considered to be an answer to the application. But it would be absurd, I humbly think, for us to affect not to know what is notorious, namely, that defences by or on behalf of insurance companies are not favoured, but the reverse, by juries. If it came to the knowledge of a jury that the defence is not by or on behalf of one of their neighbours, but of an insurance company, which is paid to protect the neighbour against just such risks, this must have a strong effect upon them in arriving at a conclusion.

A defendant, whose business possibly constitutes the main industry of the town, who employs dozens or hundreds of operatives, whose fortnightly pay-lists find their way into the pockets of people in the town and in the county who deal in the necessities and luxuries of life, is looked on with a more favouring eye than is the stranger insurance company. Therefore, the improper practice of trying to inform the jury who the real defendant is ought to be stamped out. The mere putting of the question does all the mischief. The jury will draw their own inferences from the objection taken by defendants' counsel and the ruling of the Court. The real defendant is placed in a position of manifest and incurable disadvantage. The proper course for the Judge in such a case would be to discharge the jury, and put off the trial

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to the next ensuing sittings or, preferably, to discharge the jury and try out the case himself.

While there is evidence to support the verdict, yet there is evidence the other way, and I am unable to say that the same finding would have been arrived at if the result would have been to take money out of the pockets of the jury's neighbours and fellow townsmen.

In my judgment, therefore, such evidence prevents a fair trial.

Upon counsel being asked why he put such a question at all, his only excuse was that it was, as he says, "tit for tat," inasmuch as the defendants' counsel had, upon the cross-examination of the plaintiff, asked him as to accident insurance which he had received. But this is on a different footing, and quite another matter. All that appears is the following:

"Mr. Birnie: Q. Did the company carry any insurance for you? A. Yes.

"Q. How much was it? A. That the insurance paid to me? \$250.

"Mr. Creswicke: That has nothing to do with it. I suppose you paid the premiums? A. I did. I had to pay it."

No objection was taken, unless the remark of counsel for the plaintiff prefacing his own question can be considered such.

It would probably be held, in view of cases such as *Bradburn v. G.W.R. Co.* (1874), L.R. 10 Ex. 1, and the *Marpessa* (1891), P. 403, at p. 407, that, notwithstanding cases like *Farmer v. G.T.R.* (1891), 21 O.R. 299, see p. 306, and *Hicks v. Newport, etc., R.W. Co.* (1857), 4 B. & S. 403a, the fact of such insurance could not be taken into consideration by the jury. But, even if two wrongs could make a right, the effect and the whole effect of such evidence would be upon the question of damages; and as the jury were expressly told by counsel for the defendant, as well as by the learned Judge, that it could not affect the damages, there need be no fear of this evidence having had any effect. The case is different where the jury are, in effect, told that the real defendants are not their neighbours, but an insurance or guarantee company.

There is inherent power in the Court to prevent an unfair advantage on the part of plaintiff or defendant, and an unfair

advantage was taken in this instance. Moreover, this advantage tended not simply to increase the damages, but also to cause a finding that any damages at all should be paid.

I have read with interest and deference the two Irish cases cited by my brother Anglin. As Walker, L.J., says, in *Tait v. Beggs* (1905), Ir. R. 2 K.B., at p. 536: "Every case in which the general order is sought to be applied must depend on its own circumstances," and if anything which I have above set forth would seem to be in conflict with dicta of so high authority, I can only say that I have the presumption to think that I know the conditions of life in, and the entirely human and natural tendencies of the people of, mine own province.

I think that there should be a new trial, and, in view of the course taken at the trial, the costs of this appeal and of the former trial should be costs to the defendants in any event.

RIDDELL, J., concurred in the result of the judgment of Falconbridge, C.J.

ANGLIN, J.:—The defendants appeal from the judgment entered in favour of the plaintiff by Mabee, J., at the trial, upon answers of the jury to questions submitted to them. They ask for a reversal of this judgment, and for the entry of a judgment dismissing the action or in the alternative for a new trial.

The action is brought for injuries resulting in the loss of an eye, sustained by the plaintiff, as he alleges, because of the negligent use by the defendants of an improper or defective die in their shipbuilding works at Collingwood.

The Court expressed its view upon the argument that the several grounds of objection urged on behalf of the defendants must, with one exception, fail.

The learned trial Judge, against the objection of counsel for the defendants, permitted counsel for the plaintiff, in cross-examining the defendants' manager, to adduce evidence that the defendant company was indemnified, at least partially, against any verdict that might be given in favour of the plaintiff, by a policy of insurance with an accident and guarantee company.

For the defendants it is now urged that the admission of this evidence was improper, and that they are on that ground entitled to a new trial.

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That the evidence was irrelevant to the issues upon the record is unquestionable. The only pretence upon which it can be sought to justify its introduction would be for the purpose of impeaching the credibility of the witness to whom the question was put. But an irrelevant question may not be put to a witness for the mere purpose of impeaching his credit by subsequently contradicting his answer: Taylor on Evidence, 10th ed., 1435. No authority was cited by counsel for the plaintiff in support of his contention that this evidence was properly received; neither have I been able to find such authority. The impropriety of admitting the evidence is, in my opinion, quite clear. That it might in some cases unfairly affect the jury to the prejudice of the defendants admits of little doubt: see *Sawyer v. Arnold* (1897), 90 Me. 369; *Anderson v. Duckworth* (1894), 162 Mass. 251; and *Barrett v. Bonham Oil and Cotton Co.* (1900), 57 S.W. Rep. 602.

Formerly an appellant establishing these propositions would have made out a case clearly entitling him to a new trial: *Wright v. Tatham* (1837), 7 A. & E. 313, 330; *DeRutzen v. Farr* (1835), 4 A & E. 53.

But Con. Rule 785 forbids the granting of a new trial because of the improper reception of evidence "unless some substantial wrong or miscarriage has been thereby occasioned." Of the purview and effect of this provision, which in the House of Lords has been spoken of as very beneficial and useful, Lord Watson said, in *Bray v. Ford*, [1896] A.C. 44, at p. 50: "I have purposely abstained from suggesting any general rule applicable to the construction of Order xxxix., r. 6. I doubt the possibility of formulating any rule which would be useful, and I do not doubt the inexpediency of making the attempt. Each case must depend upon its own circumstances."

In *Bray v. Ford* the jury had been misdirected in a matter which, in the opinion of the members of the House of Lords, probably affected their assessment of damages. Their Lordships declined "to speculate what might have been the result if the Judge had rightly directed the jury." The action was for libel, in which, as their Lordships point out, "the damages cannot be measured by any standard known to the law," and the assessment "is the peculiar function of a jury." These features of the case account for the reversal of the judgment of the Court

of Appeal, which had refused a new trial because a case of substantial wrong or miscarriage occasioned by the misdirection had not, in its opinion, been made out.

On the other hand, in *Manley v. Palache* (1895), 73 L.T. 98, the Judicial Committee, applying the same provision, which is found in the Jamaica Civil Code, refused the plaintiff a new trial in a case in which admissible evidence had been rejected, but in which it was clear to their Lordships that the result would not have been different had the rejected evidence been received. Lord Watson, giving the judgment of the Board, analyzes the verdict and the charge, and reaches the conclusion that, having regard to the questions to which the charge of the learned Judge had directed the attention of the jury, their verdict involved a finding against the plaintiff upon a point necessarily fatal to his case, and upon which the rejected evidence had no bearing.

In *Bank of Hamilton v. Isaacs* (1888), 16 O.R. 450, a Divisional Court ordered a new trial because of the improper admission of evidence. In its opinion "the charge of the learned Judge, advertng to this evidence so improperly received and to its importance," made it clear, "having regard to the whole case," that "substantial wrong and miscarriage was thereby occasioned." The evidence improperly received was in contradiction of an irrelevant statement made by one of the defendants, and it was used to discredit his entire testimony.

In *C. v. D.* (1904), 8 O.L.R. 308, 318, 12 O.L.R. 24, 27, improper reception of evidence is one of the reasons given for ordering a new trial, notwithstanding an explicit direction to the jury in the charge of the trial Judge, that they must disregard such evidence, and that they could base no finding upon it. But in this connection the Appellate Court alludes to other efforts to create suspicion and prejudice against the appellant by which the Court appears to have been much influenced in granting relief.

The last reported case that I have found, in which the scope and effect of this limitation, placed by the judicature rules upon the right to a new trial because of the improper reception of evidence, is considered, is *Tait v. Beggs* (1905), Ir. R. 2 K.B. 525. This was an action against a husband and wife for slander spoken by the wife impugning the chastity of the plaintiff. Two apologies, signed by the female defendant, addressed one to the person with

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whom the plaintiff was said to have been guilty of improper conduct, and the other to the gentleman at whose house the improprieties were said to have occurred, were received in evidence for the plaintiff. It was also sworn to by her and not denied that the male defendant had offered to compromise the action for £10, accompanying his offer with a threat if it were refused. The King's Bench Divisional Court ordered a new trial on the ground that the apologies signed by the wife alone were improperly received in evidence against the husband, Palles, C.B., saying that this evidence "was undoubtedly of weight in proving the innuendo, and may have materially increased the damages."

Upon appeal from this judgment, the Court of Appeal held that the apologies were not admissible in evidence, but also held that there was, without them, evidence sufficient to sustain the verdict; that no substantial wrong or miscarriage had been occasioned at the trial; and that the verdict should stand. The Lords Justices take the view that the husband's offer to settle the plaintiff's claim, taken with the uncontradicted evidence given of the publication of the slander, accounted for his being found liable; and that his threat to the plaintiff fully explained the substantial damages awarded—£100.

Examining the present case in the light of the foregoing authorities, I find the following features which seem to be noteworthy:

The verdict is not general, but consists of answers to specific questions. The jury find that the cause of the plaintiff's injuries was negligence of the defendants in having an improper die, defective to the knowledge of their foreman or superintendent, which broke, and thus injured the plaintiff, who was himself guilty of no contributory negligence. There is some reasonable evidence to support each of these findings, and they are precisely the findings which I would expect an average jury to make upon such evidence, whosoever the defendant might be.

Then the damages awarded are \$1,500 for the loss of an eye. The plaintiff was a blacksmith, earning \$2 a day. After being injured he was under medical care for nine or ten weeks, and suffered much pain. He has been obliged to relinquish entirely his trade as a blacksmith, and now earns a somewhat precarious livelihood, keeping a couple of cows, and selling milk and tea and tobacco in a small shop. Having regard to all the circum-

stances, it is impossible to say that \$1,500 is more than a fair compensation for the injury sustained by the plaintiff. On the contrary, I think it falls short of adequate compensation, and I cannot assume that the jury would have given less had they believed that fellow townsmen would sustain the loss.

I discover nothing, therefore, in the findings of the jury or in the assessment of damages to indicate that the admission of evidence that the defendants were protected by insurance affected in the slightest degree the verdict of the jury: *McCreesh v. McGeough* (1873), I.R. 7 C.L. 236, 240.

Towards the conclusion of his charge, the learned Judge very pointedly and emphatically told the jury that the evidence that the defendants were insured should "form no element whatever in the decision." He further urged them "to dispose of the questions without in any way considering whether there is any insurance company behind the defence or not."

We are now asked to assume that the jury disobeyed these instructions, and allowed themselves to be influenced by this evidence, which they were expressly told to disregard; that, notwithstanding the learned Judge's directions, because an insurance company might have to pay it, they were induced to give a verdict different from that which they ought to have rendered and would have given if they had not been informed that the defendants had an indemnity.

In the absence of any indication of impropriety in the verdict itself, I must decline to ascribe to the jury such injustice, such a yielding to unfair considerations and improper motives, as a judgment in favour of the defendants, necessarily based upon an opinion that there had been a substantial wrong or miscarriage at the trial, would imply. I find nothing in the present case to justify such an opinion. On the contrary, everything here tends to the conclusion that the verdict is just and fair. In these circumstances I cannot think that the defendants are entitled to a new trial because they may have lost some benefit of such adventitious circumstances as their local importance and influence, to which the jury could only give consideration and effect if prepared to disregard their oaths and to award to the plaintiff less than fair compensation. The object of the Judicature Rule is, as put by Holmes, L.J., in *Tait v. Beggs*, "to prevent one of the

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greatest hardships in legal proceedings—an unnecessary second trial.” To quote the language of Walker, L.J., “it would be unjust to both parties to have another trial, and when I come to that conclusion, it is just the case for the application of the general order, and serves its object.”

But, while I am satisfied that the present appeal should not succeed for the reasons which I have indicated, it appears to me to call for this observation. Where, in cases not within sec. 102 of the Judicature Act, counsel has improperly taken a position apt to unfairly prejudice the interests of the party to whom he is opposed, and especially where, notwithstanding objection, he deliberately persists in such a course, if the trial Judge should summarily dismiss the jury and try out the case himself, his action would, in my opinion, be not only warranted but most commendable.

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*Trusts and Trustees—Shares in Company—Trustee for Several Beneficiaries—
Right of One Beneficiary to Apportionment.*

Where a trustee held a number of shares in the capital stock of a company in trust for several persons, each of whom was entitled to a certain proportion of the face value of the same, but no provision was made for sale or division of the stock, and no time was fixed during which the trustee was to hold, and one of the *cestuis que trust* brought an action to compel the trustee to transfer to him a portion of the shares equivalent to his interest, but the other *cestuis que trust* were not made parties to the action and objected to the transfer being made:—

Held, that, independently of the question of the interests of the unrepresented *cestuis que trust*, the trustee could not be compelled to discharge his trust piecemeal.

THIS was an action tried before TEETZEL, J., at the Berlin non-jury sittings, on 5th November, 1907.

A. Millar, K.C., for the plaintiff.

Dunbar, for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully set forth.

December 16. TEETZEL, J.:—The defendant is trustee for plaintiff and six others (one of them being himself) of fifteen shares of the two hundred shares of the capital stock of the Silver Spring Creamery Co. These shares were issued in part payment of the purchase money for the assets of another company, in which the *cestuis que trust* held stock amounting in all to \$1,060. The plaintiff's holding amounted to \$430, so that his interest in the fifteen shares is a trifle over six shares.

The action is to compel the defendant to transfer to the plaintiff six shares, damages for refusal, and an account of moneys received by the defendant as such trustee for the plaintiff's use and not paid over.

For the defendant it was contended that one of several *cestuis que trust* could not compel a trustee to be relieved of his trust in piecemeal or to apportion a part of the trust property and transfer it to the plaintiff.

Smith and Snow v. Snow (1818), 3 Mad. 10, is authority for the proposition that where the trust fund is a certain ascertained sum of money of which the plaintiff is entitled to an aliquot part, he may maintain an action against the trustee to recover his aliquot share without making the other beneficiaries parties.

I am unable to apply the principle of that decision to the present case, because, while it is plain that where the subject of the trust is an ascertained sum of money, the payment to one of the *cestuis que trust* of his share could not affect the rights of the others or the values of their shares, it does not follow that where the subject of the trust is stock, the rights and interests of the others interested may not be affected by transferring a portion to one of the beneficiaries.

The defendant, as holder of the fifteen shares, has a voting power in respect of them, and circumstances might easily arise where he would hold the balance of power between rival factions, and thus be able to control the election of the directors and the business policy of the company, while he might not be able to do so without the six shares. Then there is the fact that four of the *cestuis que trust* would, upon a sub-division of the shares, be entitled to less than one share each, which would leave them without a voice in the affairs of the company, for there is no provision in law for a holder of less than one share being entitled to

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vote at meetings of the company. Under the trust arrangement each beneficiary has an interest in the franchise that may be exercised by the trustee with reference to the fifteen shares, and no order should be made in their absence which might in any way impair or prejudice the value of their holdings.

Evidence was given at the trial that all the other *cestuis que trust* object to the transfer being made to the plaintiff.

Independently of the question of the interests of the unrepresented *cestuis que trust*, I am of the opinion that, under the circumstances of this trust, the defendant cannot be compelled to discharge his trust in detail. The defendant is simply a trustee for convenience, holding the shares in trust for the plaintiff and others, no provision being made for sale or division, and no time being fixed during which he is to hold. As stakeholder of the property, he must hold the scales evenly, and see that the rights of the several parties are mutually respected: Underhill on Trusts, 6th ed., p. 296.

In *Goodson v. Ellison* (1826), 3 Russ., at p. 594, Lord Chancellor Eldon expressed the view that a trustee could not be called on from time to time to divest himself of different parcels of the trust estate so as to involve himself as a party to a conveyance to many different persons, and he puts this question:

"Has not a trustee a right to say, 'If you mean to divest me of my trust, divest me of it altogether, and then make your conveyances as you think proper?' I have been accustomed to think that a trustee has a right to be delivered from his trust if the *cestuis que trust* call for a conveyance."

This case is cited in Godefroi on Trusts, 3rd ed., p. 583, as an authority for the proposition that a trustee cannot be required to convey the estate piecemeal at various times: see also Lewin on Trusts, 11th ed., p. 860.

The action must be dismissed with costs.

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[IN THE COURT OF APPEAL.]

MONTGOMERY v. RYAN.

RYAN v. BANK OF MONTREAL AND MONTGOMERY.

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Banks and Banking—Overdrawn Customer's Account—Promissory Notes—Collateral Securities—Transfer to Third Person—Inspection of Customer's Account—Bank Act, 1890, sec. 46—Interest—Compounding.

R., having had an account with a bank for many years previous to the 16th July, 1906, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due by R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an account and damages and other relief:—

Held, that the bank were not prohibited by sec. 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note; and that R.'s action failed.

Held, also, MEREDITH, J.A., dissenting, that the bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed; in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.

Judgment of CLUTE, J., reversed.

THE action of MONTGOMERY v. RYAN was brought to recover \$12,789.24 and interest at 6 per cent. from the 16th July, 1906, upon a demand note dated the 16th November, 1905, for \$17,240, with interest at 6 per cent. until paid, made by Peter Ryan (the defendant) to the Bank of Montreal, and transferred to Montgomery, the plaintiff, by the Bank of Montreal, with certain collaterals pledged by Ryan to secure his account with the Bank of Montreal.

Ryan, by his defence, denied indebtedness, and alleged that the note had been paid by collections made by the bank, of which only partial credits had been given; that the bank held as collateral a claim against the Ashcroft Water Electric and Improvement Company (hereafter referred to as the Ashcroft Company), upon which the bank recovered judgment for \$3,325.60 and costs of

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action, which had been paid, amounting in all to \$3,775.31; that the bank received other collections from collaterals and wrongly debited the defendant (Ryan) with certain alleged costs, and illegally charged interest, discount, and compound interest against the defendant; and he counterclaimed for \$12,500.

The second action was brought by Peter Ryan (the defendant in the former action) against the Bank of Montreal and Montgomery in respect of the same transactions. By the statement of claim Ryan alleged that for many years he was a customer of the Bank of Montreal and had his account with the bank since prior to 1890; that in July or August, 1906, the Bank of Montreal claimed a balance of \$12,789.24 as the balance due upon the said promissory note, and he repeated the charges in substance of wrongful debits for interest and not giving credit for collections, and that the bank held a large number of securities pledged by Ryan as collateral to his account, of much greater value than the balance claimed to be due. Ryan then charged that the bank, having made these overcharges, and not giving due credit to the plaintiff, colluded and conspired with Montgomery against the plaintiff (Ryan) to maintain this illegal and wrongful condition of the account, and prevented the plaintiff from obtaining a just and proper account-taking with the bank, so as to enable the bank to wrongfully recover the \$12,789.24 claimed as due. It was charged further that Montgomery was actuated by malicious motives, of which the Bank of Montreal were well aware, and that the bank, in order to promote their own wrongful purposes and objects, and the wrongful and malicious purposes of Montgomery, assigned and transferred the plaintiff's account as a customer of the bank, and the amount of the indebtedness then alleged to be due, and received therefor the sum of \$12,000, for the purpose of enabling Montgomery to attempt to recover from the plaintiff the said sum as a pretended balance due on the account and upon said promissory note, and, as a part of such transaction, assigned and transferred all the securities collateral to said account; that the bank wrongfully and illegally exposed to defendant Montgomery the account and dealings and transactions by the plaintiff as a customer of the said bank in order to effect their wrongful purpose, and to promote the combination and collusion between the bank and the defendant Montgomery; that the Bank

of Montreal entered into a covenant of indemnity with Montgomery at the time of such transfer; that Montgomery caused proceedings to be taken in the High Court against Ryan for the recovery of the alleged balance; and that Montgomery throughout was the agent of the bank. It was further alleged that the bank charged an excessive rate of interest; that the defendants intended to attempt to realize upon the said securities, and threatened the sale and sacrifice of the same; that the plaintiff demanded a full and true statement in detail of his account with the bank, which had been refused. There were also charges of negligence in collecting the securities.

The plaintiff Ryan in his action claimed an account against the bank and to have it declared that the charges of interest and compound interest were excessive; to set aside and cancel the transfer of the account and securities and statement of all securities held by the defendants for the plaintiff; and an order enjoining the defendants from further transferring or dealing with the securities; and a declaration as to the wrongful, illegal, and collusive acts by and between the defendants and others as against the plaintiff; and claimed \$50,000 damages.

The bank denied all charges of fraud or other improper conduct, and alleged that on the 15th November, 1905, the bank rendered a statement to Ryan shewing the balance due upon his account at that time of \$17,240, which he admitted to be correct, and therefor gave the said note; that the bank held collateral securities of Ryan, which were dealt with under his direct instructions; that, among other securities, were certain promissory notes made by the Ashcroft Company, upon which the bank brought action at his request in British Columbia. That action was defended, but when the action came on for trial one John Shields, chairman of the Ashcroft Company, makers of the said note, offered to consent to judgment in favour of the bank, and to take an assignment of the claim of the said defendants against the plaintiff and all the securities, including said judgment, held as collateral thereto; that the bank accepted the offer, and on the 16th July, 1906, an agreement was made between the Bank of Montreal and Montgomery, as the nominee of Shields, whereby the bank, in consideration of \$12,789.24, transferred to Montgomery the Ryan account, amounting then to \$12,789.24, and

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assigned and transferred to Montgomery the said collateral securities; that the bank received the said sum, being the full consideration named in the assignment and transfers, and handed over to Montgomery the said note and all the collateral securities held by the bank. The bank denied that they charged illegal rates of interest, and said that it was not true that they refused an account; that if an account were granted it should be limited to six years; and finally alleged that at the time of the assignment Ryan was justly and truly indebted to the bank in the said sum of \$12,789.24 in respect of said promissory note; that they had demanded payment and that payment had been refused.

The defendant Montgomery denied all charges of improper conduct or that he was acting as agent of the bank. He claimed under the assignment of the 16th July, above referred to, and under the said note indorsed to him, of which he claimed to be the purchaser without notice, and claimed the balance upon the note, less \$465.85 collected. He alleged, further, that among the securities given by the plaintiff was a certain mortgage of the Metropolitan Soap Company for \$10,000, dated the 28th January, 1904; that the plaintiff never executed the assignment of the same for registration, and had refused to do so; that among said securities were also certain debentures, from one to twenty inclusive, of the Cape Breton Exploration and Development Company Limited, for \$2,500 each, registered in the name of the plaintiff, and that he had not transferred these securities so as to enable the defendant to be registered as owner thereof, and that he had refused to do so; and by way of counterclaim he asked damages for such refusal and an injunction restraining the plaintiff from incumbering or dealing with the said securities, and for a mandatory order to assign said mortgage and transfer.

In reply the plaintiff, besides joining issue, alleged that the promissory note was not intended to represent the actual indebtedness, and further charged that the attempted acts of the bank shewed that their acts were wholly unauthorized, irregular, and wrongful, and fraudulent as against the plaintiff, and that they colluded with said Shields and Montgomery to ruin the plaintiff, and that their wrongful acts estopped them from alleging any indebtedness to either of them by the plaintiff, Ryan.

The actions were tried together before CLUTE, J., without a

jury, at Toronto, on the 4th, 5th, 6th, 7th, and 8th March, 1907.

C. Millar, for Montgomery.

G. H. Watson, K.C., and *N. Sinclair*, for Ryan.

G. F. Shepley, K.C., for the Bank of Montreal.

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March 25, 1907. CLUTE, J. (after setting out the facts as above):—The evidence in part was very contradictory, but from the correspondence and documents the main facts are sufficiently clear. Mr. Peter Ryan had an account with the Bank of Montreal since 1895; the account shews large transactions, the monthly deposits varying and reaching at times from \$20,000 to over \$100,000 monthly. Hypothecation was made of various securities to the bank as collateral to the account and future advances. At the end of each month Ryan received, through his duly appointed attorney, the monthly cheques, and acknowledged in the usual way affirming the account. I find that the account was not examined either by himself or his attorney, and that he was not aware from time to time what rate of interest was being charged.

On the 16th July, 1905, Ryan gave a demand note to the Bank of Montreal for \$17,240, with interest to and until paid at 6 per cent. This amount represented the balance due to the bank of various advances, as appeared in Ryan's account, and included interest at 7 per cent. and compounded monthly.

Among the securities held as collateral by the bank was the Ashcroft note, upon which I find Ryan had advanced the full face value thereof in cash. The bank, pressing for payment, at Ryan's request put this note in suit in British Columbia. The action was defended, and one John Shields, who had been interested with Ryan in mills and timber limits in British Columbia, was exceedingly anxious to prevent judgment being recovered upon this note against the Ashcroft Company. A dispute had arisen between Ryan and Shields in respect of a certain sale made of certain timber limits and mills in British Columbia. The uncontradicted evidence shews that Ryan had advanced some \$197,000 to the Ashcroft Company, in which he and Shields were interested as stockholders. A sale was made of the entire interest of the Ashcroft Company for \$225,000 to one Fowler and his associates, of which sum \$175,000 was to be paid to the ven-

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dors, and the balance of \$50,000 divided among Fowler and his associates who had conducted the negotiations for the sale. So that the actual purchase price paid was \$175,000. The \$145,000 that Ryan received was applied on payments of debts, leaving unpaid a large balance due Ryan, and the said Ashcroft notes in the hands of the bank unpaid. A dispute had arisen in regard to another timber deal between Shields and Ryan, in which Shields claimed that he was entitled to receive some \$20,000 from Ryan, but Ryan claimed that Shields was largely indebted to him. The merits of this dispute were not further disclosed.

When the transaction for the sale of the Ashcroft property came to be completed, Shields controlled the situation, and refused to convey to Fowler and his associates until he had been paid the said \$20,000. If judgment had been obtained and execution placed in the sheriff's hands upon the Ashcroft notes, the amount might have been realized by the Bank of Montreal of the \$3,000. Shields and Fowler, therefore, were interested from different motives in preventing judgment being obtained on the Ashcroft notes; Shields because he had not been paid the \$20,000, and Fowler because he was interested in preventing an execution against property for which he had in whole or in part paid. Under these conditions, negotiations commenced first with Shields and the Bank of Montreal to purchase the Ryan securities. At first it was desired to purchase only the judgment to be obtained against the Ashcroft Company, but the bank refused to sell part, and insisted upon Shields taking over the entire account and the securities collateral thereto. This ended in an agreement with Shields, for whom Montgomery was acting at this stage, and who was Shields's nominee. The agreement in the form of a letter, which was accepted, is as follows:—

“Toronto, January 18, 1906.

“J. D. Montgomery, Esq.,

“Barrister, etc., Toronto.

“*Bank of Montreal v. Ashcroft.*

“Dear Sir,—As I understand, the verbal arrangement made with you this afternoon on behalf of the defendants herein, in respect to the action which will come up for trial at the sittings of the Court in Vancouver, B.C., on the 23rd instant, is as follows:—

"1. Judgment to be entered for the plaintiffs for full amount of their claim and costs of action, by consent.

"2. No execution or attachment to be issued until the expiration of thirty days after the 23rd instant.

"3. I am to telegraph instructions in accordance herewith to Mr. Stuart Henderson, the solicitor for the plaintiffs on the record, and you are to telegraph to Mr. Murphy, the defendants' solicitor on the record, to consent to the judgment accordingly.

"4. Provided the bank are the holders of or control the said judgment, they will assign it to Mr. John Shields, or his nominee, on payment of the amount thereof at any time before the expiration of the thirty days, and such judgment shall not be otherwise assigned in the meantime except to Peter Ryan or his nominee.

"5. In the event of Mr. Shields paying off the whole of the bank's claim against Mr. Peter Ryan at any time within the thirty days, while the bank holds the same, the bank will assign the same to him or his nominee, and all collateral securities held by the bank therefor.

"Yours truly,

"CROMBIE, WORRELL, & GWYNNE."

There was a delay in carrying out this arrangement, and apparently Shields was not able to pay the money. The agreement was made on the 18th January, 1906, and a few days thereafter Fowler came to Toronto, had an interview with Shields, and finally arranged an appointment with Shields at the office of Mr. Worrell, solicitor for the Bank of Montreal, who was charged with the negotiations which resulted in the transfer. This meeting took place on the 26th January, 1906. While no final arrangement was made, it was understood that Fowler would take the place of Shields, advance the money, and take over the Ryan account with the collateral securities. Fowler in his evidence denied that he was acting in harmony with Shields, and said that on the 26th January he did not know the extent of the negotiations between Shields and the Bank of Montreal. Fowler was evidently in error with reference to this, and I find as a fact that he had knowledge of what had been done in reference to the agreement between Shields and the bank, that Montgomery was to be the *alter ego* of Shields in this transaction, and that when

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Shields was not able to advance the money the parties arranged to carry out the same agreement that had existed between Shields and the bank, in the name of Montgomery acting as trustee and in the stead of Fowler. Although the pleadings declare that Montgomery was acting for Shields, as a matter of fact this was done to prevent Fowler's name appearing, who did not desire, as he says, to have Ryan know that he was acting in the premises, but the evidence was perfectly clear, both from Fowler and Montgomery and the documents, that Montgomery merely acted as his trustee.

The correspondence resulting in the agreement between the bank and Montgomery was very voluminous. The following facts emerge clearly enough:—The bank held a balance against Ryan, overdue, secured by collaterals, which I find were more than sufficient to pay off the claim. Shields and Fowler, from different motives, desired to obtain these collaterals, to use as a lever or pressure on Ryan in a way to compel him to pay the \$20,000 which Shields claimed, and in order to secure the title to the property which Fowler had bought. The Bank of Montreal at this time were pressing for payment, and some ill-feeling seems to have existed between Ryan and the bank manager over the account. At all events, it was said that Ryan refused to again visit the bank. The bank refused to sell the securities piecemeal, and I find as a fact that they were offered payment of the claim against the Ashcroft Company in full, and refused it, insisting upon receiving the full amount of the account and transferring the whole account and all the securities. I find that Ryan was kept in ignorance of what was being done, that he received a notice, unsigned, sent by the bank's solicitors, but I do not find that the further notice was ever received. The evidence in reference to this last notice was in effect as follows. It is shewn that an entry was made in the solicitor's book on the date of the notice, indicating, not that the notice had been delivered, but that the notice was to be delivered; that that was the practice of the office; and that the lad who made the entry had no recollection whether he delivered the notice or not. I find, therefore, with reference to this second notice, that it was never received by Ryan. I find further that the demand note was past due at the date of the alleged transfer. I also find that the note is made

up of charges which include interest at 7 per cent. and compound interest, and I further find that the bank never stipulated with Ryan for the payment of 7 per cent. interest.

The formal agreement dated the 16th July, 1906, made in pursuance of the letter of the proposal and acceptance above referred to, recites that the Ryan securities were pledged to the bank for payment of his then present and future liabilities, subject to the terms thereof. It refers to the recovery of the judgment of the bank against the Ashcroft Company, and recites: "And whereas it was agreed at the said date that proceedings in the said last mentioned action should be stayed, on the assignee paying to the assignors the full amount of the assignors' claim against the said Ryan and taking an assignment of the said claim and of all securities held as collateral therefor." It further recites that the amount owing in respect of the said claim at this date is the sum of \$12,789.24, and that the assignors hold as security therefor the securities set out in the schedule thereto: "And whereas the said assignee has this day paid to the assignors the sum of \$12,789.24, now therefore this indenture witnesseth that in consideration of the premises and of the payment to the said assignors of the said sum of \$12,789.24 of lawful money of Canada (the receipt whereof is hereby acknowledged) the said assignors do hereby assign, transfer, and set over unto the said assignee, his executors, administrators, and assigns, all the said sum of \$12,789.24 now owing by the said Peter Ryan as aforesaid, together with all moneys that may hereafter become due or owing in respect thereof, and the full benefit of all powers for the enforcement of payment thereof."

It will be noticed that the demand note is not specially mentioned, nor is it referred to in this document. It then proceeds with a general assignment of the collateral securities, "to the intent that the said assignee shall take and assume the position of the said assignors in respect of the said indebtedness and of the said collateral securities," subject to the terms and conditions set out in the letters of hypothecation and the rights and equity of redemption of the said Peter Ryan.

The bank then covenant that the said sum is owing and not paid, and that the bank have done nothing whereby the said Peter Ryan has been released or discharged therefrom, and then

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proceeds as follows: "And that they (the assignors) will at all times hereafter, at the request of, but at the proper charges, costs, and expenses of the assignee, produce and exhibit the books of account and other evidence of indebtedness and entries and furnish copies thereof respecting such collateral security for the purpose of establishing the same and for the purpose of the enforcement of the obligations respecting such assigned premises as may be reasonably required." Then follows the covenant of indemnity on the part of the assignee.

Under the original offer and acceptance it will be seen that there was a time limit. This was extended for thirty days, and, the full transaction not being completed, the bank insisted upon payment of the judgment, and thereupon the defendant Montgomery gave his cheque to the solicitor of the bank for the amount of the Ashcroft judgment, who held the same until the transaction was finally carried out, when Montgomery gave his cheque to the bank for the full claim, including the amount of the judgment; whereupon on the 16th July the bank's solicitor by cheque repaid Montgomery the amount received from him, \$3,773.31, being the amount of the Ashcroft judgment.

I find further that this judgment was never paid by the debtor, that is, the Ashcroft Company, but that the money was paid by Montgomery through moneys placed to his credit by Fowler, and that when the Ashcroft judgment was paid in the first instance by Montgomery, it was understood between him and the bank's solicitor that upon the agreement being fully carried out this amount should be returned to Montgomery.

On the 16th July, 1906, Montgomery gave his cheque on the Dominion Bank to the bank's solicitor, Mr. Worrell, for \$12,789.24. This cheque was indorsed over to the Bank of Montreal, and thereupon it was stamped paid. Indorsements appear on the back of the note shewing previous receipts upon the note, and also \$12,200 appears indorsed upon the note. Afterwards, and, as the assistant manager alleges, on the same day, the words "cancelled in error" were indorsed on the note by the assistant manager. The note itself does not appear to have passed into the hands of Montgomery until about the time the action was brought.

If one is to judge from what took place at the time, it would appear that the bank regarded the note as paid, and that neither

party regarded it as material to the transaction they entered into by the agreement of the 16th July, 1906. The note not being mentioned in that agreement, it would appear that the parties did not consider a transfer of the same material, and I am inclined to think that it was an afterthought on the part of Montgomery's solicitor in demanding the note as the most convenient way of recovering the balance of the account from Ryan. This view reconciles all the evidence. It was the collateral securities that Shields and Fowler desired, and the question of the transferring of the note I do not think ever was considered, and I find as a fact that when the negotiations were closed and the money paid, Montgomery accepted and received the assignment of the account and the collateral securities, and did not ask for or receive the promissory note sued on; and I find that at the time the bank assumed to transfer the note there was nothing due to the bank upon the note, so far as the bank were concerned, the bank having received their entire claim by the assignment of the account and the collateral securities as above mentioned. I think, however, that under the agreement, although the note was not mentioned and probably not thought of, its terms are broad enough to entitle Montgomery to call for its delivery. I refer to the clause in the agreement which provides "that they (the assignors) will upon request . . . do, perform, and execute every act, deed, and further assurance necessary to enable the said assignee, etc., to enforce the full performance of the obligations respecting the hereby assigned premises." In other words, that Montgomery having purchased the account and collaterals, and this account being at the time covered by the demand note, he had the right from his position to call for the demand note as an act to be done by the assignors as a further acknowledgment and assurance of the account, and that it is by virtue of the agreement that he was entitled to such transfer and not otherwise, and that if the agreement should fail his right to a transfer of the note would necessarily fail with it.

I find, further, as a fact that the bank furnished copies of the securities and submitted the account of Mr. Ryan to the inspection of the defendants and their solicitors, and that, with the bank's knowledge, the money was attempted to be raised by transferring the entire account and the securities to the Bank of Hamilton,

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and I find that not only did they permit inspection of Ryan's account, but their covenant to allow further inspection was the foundation of the agreement without which the assignee Montgomery would probably not have carried out the purchase.

The points for decision on this branch of the case upon this somewhat complicated statement of facts are:—

1. Have the bank been guilty of a breach of sec. 46 of the Bank Act ?

2. If so, does such breach invalidate the whole agreement ?

3. Having regard to the manner in which the note was received, does it preclude the plaintiff Montgomery from recovering on the note ?

4. Is the plaintiff Ryan entitled to damages for the alleged wrong done him by breach of the Bank Act in permitting his account to be inspected and sold ?

Section 46 of the Bank Act of 1890 is as follows:—"46. (Inspection of books.) The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors; but no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank."

In *Re Chatham Banner Co., Bank of Montreal's Claim* (1901), 2 O.L.R. 672, Street, J., suggests "that the intention of the clause . . . probably was to do away with the right which a shareholder in the bank, as a *quasi*-partner, might possibly have asserted of inspecting the accounts of the banking company." It was held in that case that the clause "does not enable a bank to refuse to disclose its transactions with one of its customers, when the propriety of these transactions is in question in a court of law between the bank and another customer who attacks them, and shews good cause for requiring the information he seeks." This clause was first made a part of the Bank Act of 1871, 34 Vict. ch. 5, sec. 37.

It seems probable that the clause was introduced to put at rest the doubt as to the law as it stood prior to this enactment. In *Tassell v. Cooper* (1850), 9 C.B. 509, Maule, J., expressed doubt as to whether there was any such duty imposed on the bank, while in *Foster v. Bank of London* (1862), 3 F. & F. 214, it was held that an action lay for this breach of duty, and in *Hardy v. Veasey*

(1868), L.R. 3 Ex. 107, Byles, J., was of opinion that a bank might make such a disclosure on a justifiable occasion.

In the present case inspection was allowed with a view of selling the account, and on the sale of the account the bank covenanted to allow future inspection. The question, therefore, resolves itself into this: Had the bank a right to allow inspection with a view of selling, and, having sold, to allow inspection to the purchaser? And is an agreement for sale containing such covenant valid so as to pass the account? The right of inspection was insisted upon by the purchaser and granted by the bank. If the bank had no right to allow inspection, is that part of the agreement valid and the clause only invalid which allows inspection?

It is against the policy of the law that any person who is not a director should be allowed to inspect the account of any one dealing with the bank, and, this being so, any agreement which carries with it the right to inspect is in direct contravention of the Bank Act. Indeed, I do not well see how any account could be sold without inspection, and if that be so, a bank has no right to sell a customer's account as such. The evidence shews that the present case is unprecedented so far as the Bank of Montreal is concerned.

It is difficult to imagine anything more likely to shake public confidence in our banks than the knowledge that customers' accounts are open to inspection and sale. Great injustice might be done by exposing the private affairs of a customer and selling his account to an avowed enemy or one who desired to use his information as a "lever" for private ends, as was admitted in this case. Having regard to the high standing of the Bank of Montreal, it is almost incredible that they should so disregard their duty to their customer.

As I have pointed out, the transfer of the account, collaterals, and note, was under this illegal contract. Montgomery had no other title except that which he received under this contract made in direct violation of the law: *Bensley v. Bignold* (1822), 5 B. & Ald. 335, 340.

I think the whole agreement is void because there is one entire consideration, viz., the sum paid for what Montgomery was to receive. He bargained for an assignment and inspection of

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the account, and, assuming that he was entitled to claim a delivery of the note, it also was under the agreement.

Even supposing that the assignment of the account was legal, and the agreement to allow inspection illegal, one sum was paid for both, and the whole contract is void: *Hopkins v. Prescott* (1847), 4 C.B. 578; *Alexander v. Owen* (1786), 1 T.R. 225, 227.

I will deal now with the question of interest.

In *Dawes v. Pinner* (1810), 2 Camp. 486 note, Lord Ellenborough would allow only simple interest on a bank account where the defendant had at different times overdrawn, and the balance was struck at stated times, and interest then charged on the sums found to be due.

The House of Lords decided in *Page v. Linwood* (1837), 4 Cl. & F. 399, that the contract between the parties not providing for compound interest it could not be allowed.

Mr. Shepley referred to *Mosse v. Salt* (1863), 32 Beav. 269, 273. The Master of the Rolls, Sir John Romilly, said in that case: "There can be no question* that when a banker and customer carry on a banking account for a series of years, upon a *certain specified system*, then (assuming it to contain nothing illegal) the Court will assume that there is an agreement between the customer and the banker, and that the account shall be kept upon that principle. In *Lord Clancarty v. Latouche* (1810), 1 Ball & B. 420, 428, it is distinctly stated, that acquiescence does not amount to a settlement of account, though it regulates the principle on which the accounts shall be taken."

In the present case to keep the account upon the system proposed would be to allow 7 per cent. compounded, which would be more than the legal bank rate of interest.

In *Lord Clancarty v. Latouche*, above referred to, the rests were made at the end of the year.

It was held in *Ex p. Bevan* (1803), 9 Ves. 223, that, though compound interest cannot be taken under an antecedent contract, accounts may be settled, even half-yearly, upon that principle. Lord Eldon says: "As to the question of compound interest, it is clear, you cannot *â priori* agree to let a man have money for twelve months, settling the balance at the end of six months; and that the interest shall carry interest for the subsequent six months; that is, you cannot contract for more than 5 per cent.;

agreeing to forbear for six months. But, if you agree to settle accounts at the end of six months, that not being part of the prior contract, and then stipulate, that you will forbear for six months upon those terms, that is legal."

And see *Barnum v. Turnbull* (1856), 13 U.C.R. 277.

From these cases it would seem that a bank may stipulate for compound interest, or such an agreement may be implied from the course of dealing, but in neither case can it be done so as to allow the bank to recover a rate of interest beyond what the law allows.

Section 80 of the Bank Act, 1890, is as follows:—

"(No penalty for usury). The bank shall not be liable to incur any penalty or forfeiture for usury, and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank; and the bank may allow any rate of interest whatever upon money deposited with it." R.S.C. 1886, ch. 120, sec. 61.

I find that there was no stipulation or agreement as to interest. There was an entry in the discount book of the bank, under Ryan's name, shewing that he was to be charged 7 per cent., but it was not suggested that he had knowledge of such entry. There is a contradiction as to what took place when it came to his knowledge that he was being charged 7 per cent. Ryan says the manager promised to make it right, that is, reduce it to the legal rate. The assistant manager, who was present, says that only referred to the future. I do not think this very material. If the higher rate of interest had been stipulated for and properly charged, there was no consideration to make a reduction, and the promise was a mere *nudum pactum*. If interest was illegally charged, there is no evidence that Ryan agreed to pay this past overcharge.

The question, therefore, is reduced to this—the bank having in fact charged 7 per cent. compounded—is Ryan bound by the monthly receipts given for the cheques? The slips read as follows:—

"Toronto, 1st February, 1904.

"I hereby confirm the statement of my account with the Bank of Montreal, Toronto, to 30th Jan., 1904, as contained in my pass

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book, and acknowledge receipt of all cheques and vouchers to same date.

"PETER RYAN,
"per K. O'Keefe, attorney."

I do not think this confirmation amounts to an acknowledgment that he will pay any rate of interest that may be charged. It may be *prima facie* evidence of the correctness of the account, but it surely would not include manifest error, much less illegal charges, if there be such: *Rex v. Bank of Montreal* (1906), 11 O.L.R. 595, 599.

Here the bank seek to charge 7 per cent. compounded monthly. I take the meaning of the statute to be that the bank may stipulate for 7 per cent., and, in default of any contract express or implied, the legal rate of interest for the time applies. I find that there was no contract with Ryan for such rate.

In *Royal Canadian Bank v. Shaw* (1871), 21 C.P. 455, it was held, under a similar section, that on a note bearing no rate of interest upon its face and discounted at 8 per cent., the bank could only charge 6 per cent. Under sec. 80 the bank have a right to receive and take in advance 7 per cent. That is a different thing from compounding monthly at 7 per cent. on the balance. I find no authority for that.

Mr. Shepley argued that at all events Ryan had acquiesced in what was done, and cited *Williamson v. Williamson* (1869), L.R. 7 Eq. 542, but in that case the charges were explained to his agent and no objection made.

In *Crosskill v. Bower* (1863), 32 Beav. 86, it was expressly agreed that the rate of interest should be 5 per cent. per annum, and the custom was to compound at the end of the year, and this was allowed. I do not think sec. 80 permits the bank to charge 7 per cent. compounded monthly. That would in effect be charging more than 7 per cent. This is what the bank have assumed to do, and not being within the limit allowed by sec. 80, it is illegal, whether agreed to or not: *Royal Canadian Bank v. Shaw, supra*.

Applying these findings to the respective actions, I think the action of *Montgomery v. Ryan* should be dismissed with costs, and the counterclaim dismissed without costs.

In *Ryan v. Bank of Montreal* it was agreed that I should assess

the damages for the wrongful inspection of Ryan's account, if so found.

I think the plaintiff suffered substantial damage. It was urged by Mr. Watson that the plaintiff was entitled to recover the full value of the securities, \$26,000, and he cited *Pigot v. Cubley* (1864), 15 C.B.N.S. 701, in support of that contention. That was an action of trover, for wrongful sale, and the finding of the jury of £20 was sustained upon the ground that time for payment had been extended, and has, I think, no application to the facts of this case. His contention I do not think tenable: (1) because, if I am right in the view I take, there was no conversion, nothing passed by the assignment; and (2) a claim for conversion of securities could not fall under this claim for damages.

It is said in *Mayne on Damages*, 7th ed., p. 8, that where there may be an injury either existing at present, though unascertained, or to arise hereafter, and for which no fresh action could be brought, substantial damages may be given at once. As, for instance, in an action against a banker for not paying his customer's cheque, citing *Rolin v. Steward* (1854), 14 C.B. 595; *Larios v. Bonany y Gurety* (1873), L.R. 5 P.C. 346; *Forman v. Bank of England* (1902), 18 Times L.R. 339.

In the present case there were special circumstances, already indicated, why the plaintiff's account ought not to have been disclosed, having regard to the business relations and enmity existing between the parties. What his pecuniary loss may be is yet uncertain. Even if Ryan justly owed Shields the amount claimed by him, and the disclosure would enable Shields to obtain payment, that is no excuse on the part of the bank. See *Foster v. Bank of London*, 3 F. & F. 214.

After the best consideration I have been able to give this branch of the case, I think \$1,000 would be a reasonable sum, and I assess the damages at that amount.

The plaintiff is entitled to judgment declaring wrongful, illegal, and void the agreement for the transfer of the account, securities, and note in question; a reference to the Master to take an account of the amount due the Bank of Montreal at the legal rate of interest—6 or 5 per cent., as the case may be. No compound interest to be allowed. The plaintiff to have credit for all payments made

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on the securities, either to the bank, their solicitors, or Montgomery.

The plaintiff to have credit for the full amount of the Ashcroft judgment debt and costs received by the bank; an account of all securities received by the bank from the plaintiff and payments made thereon.

Judgment for the plaintiff for \$1,000, with costs of action up to and inclusive of this judgment. Further directions and costs reserved.

The Bank of Montreal and Montgomery both appealed to the Court of Appeal from the judgment of CLUTE, J., and the appeals were heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 3rd and 4th October, 1907.

G. F. Shepley, K.C., for the appellants the Bank of Montreal. There is no evidence of the bank having submitted Ryan's account to the inspection of the purchaser except in the action in British Columbia under the order of the Court there. The covenant in the assignment of the 16th July, 1906, does not refer to the account of Ryan, but to the entries in the books of the bank respecting the collateral securities assigned; but even if it does refer to the account, and is illegal, it does not affect the validity of the other provisions of the assignment: *Gaskell v. The King* (1809), 11 East 165; *Howe v. Synge* (1812), 15 East 440; *Pickering v. Ilfracombe R.W. Co.* (1868), L.R. 3 C.P. 235, 250; *In re Burdett*, *Ex p. Byrne* (1888), 20 Q.B.D. 310, 314; *Baker v. Hedgecock* (1888), 39 Ch.D. 520, 522. Even if the assignment of the 16th July, 1906, were invalid, that would not affect the agreement of the 26th January, 1906. The 46th section of the Bank Act should not be interpreted as prohibiting the disclosure of a customer's account on a reasonable and proper occasion. The correct interpretation of the section is as suggested by Street, J., in *Re Chatham Banner Co., Bank of Montreal's Claim*, 2 O.L.R. 672. The section must be read with the preceding one (45), with which it is grouped under the heading of "Annual Statement and Inspection." These sections are intended to deal with the matters to be laid before the shareholders, and to define the respective positions of the directors and shareholders in regard to the inspection of books and accounts. The Court will

apply the well-known rule of construction found in such cases as *City of Toronto v. Toronto R.W. Co.*, [1907] A.C. 315, 324; *Eastern Counties, etc., Cos. v. Marriage* (1860), 9 H.L.C. 32; *Hammersmith, etc., R.W. Co. v. Brand* (1868-9), L.R. 4 H.L. 171, 190; *City of Toronto v. Virgo*, [1896] A.C. 88, 92. The bank cannot sue or prove before an assignee if they are not to disclose accounts. An account must be disclosed when it becomes necessary in legal proceedings: *Hannum v. McRae* (1898), 18 P.R. 185. Ryan was not, at the time of the alleged inspection and assignment, a person dealing with the bank, within the meaning of sec. 46, but was a debtor of the bank, in default, and whose securities were in course of liquidation. The only information afforded by the bank was the statement of the amount due on the promissory note assigned, which statement they covenanted to be correct. The bank committed no breach of any duty owed to Ryan under the Bank Act or otherwise, and he has suffered no damage by the acts of the bank, and there is no evidence on which to found the assessment of damages awarded by the judgment: *Taylor v. Blacklow* (1836), 3 Bing. N.C. 235, 3 Scott 614; *Tassell v. Cooper*, 9 C.B. 509; *Foster v. Bank of London*, 3 F. & F. 214; *Hardy v. Veasey*, L.R. 3 Ex. 107. The bank held all the securities as security for the whole of Ryan's indebtedness to them, and the bank were not bound to permit the redemption of any one security on payment of the value thereof. The bank were entitled to negotiate or discount the promissory note, and to indorse it to any person, who thereupon became the holder, and as such equitably entitled to an assignment of all securities held as collateral thereto, subject to the equity of Ryan, as maker of the note, to redeem by payment of the note: *Central Bank of Canada v. Garland* (1890-1), 20 O.R. 142, 18 A.R. 438. Choses in action are marketable. Are banks intended to be excepted? The bank were under no obligation to give Ryan any notice of their intention to indorse the note or assign the debt and collateral securities, but the bank did give him ample notice. Many of the findings of fact are not supported by the evidence. There is no prohibition in the Bank Act or elsewhere against a bank making loans, for any period, at a rate of interest not exceeding 7 per cent. per annum, payable in advance, and at the end of any such period the interest is due to the bank, and, if not then paid, the

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bank may either insist on payment of the amount due for principal and interest, or may make a new loan of the whole amount at a rate not exceeding 7 per cent., for such other period as may be desired. This is substantially what was done in regard to this account, as shewn by the evidence. The limitation of sec. 80 of the Bank Act is not 7 per cent. per annum, but 7 per cent. per annum payable in advance, which amount would not exceed a rate of 7 per cent. compounded monthly, even if the system adopted by the bank was a compounding of interest. Ryan acquiesced in this course of dealing. Reference to Grant's Law of Banking, 5th ed., pp. 4, 196, 198, 200; *Williamson v. Williamson*, L.R. 7 Eq. 542; *Crosskill v. Bower*, 32 Beav. 86; *Mosse v. Salt*, 32 Beav. 269; *Lord Clancarty v. Latouche*, 1 Ball & B. 420; *Ex p. Bevan*, 9 Ves. 223; *Benallack v. Bank of British North America* (1905), 36 S.C.R. 120; *Rex v. Bank of Montreal* (1905-6), 10 O.L.R. 117, 11 O.L.R. 595.

C. Millar, for the appellant Montgomery. After allowing Ryan credit for all moneys received from collaterals, he was still indebted in a large sum, and the note sued on was given to cover that indebtedness. Montgomery, at the commencement of this action, was a holder in due course of the note, and the equities set up by Ryan against the bank do not affect Montgomery: *Glasscock v. Balls* (1889), 24 Q.B.D. 13; Bills of Exchange Act, 1890, secs. 29, 30, 38, 85, 87, 88. Montgomery was the lawful holder, and, even if he had no beneficial interest, he could maintain his action as trustee for the beneficial owner, whoever he might be, and the action should not have been dismissed: *Shepley v. Hurd* (1879), 3 A.R. 549. The note being payable on demand, by secs. 29 and 30 of the Bills of Exchange Act, Montgomery is *prima facie* a holder in due course, that is, he became a holder before it was overdue, and no evidence was adduced to displace the presumption. The note was delivered by Ryan to the bank as a collateral or continuing security for his overdraft, and it was not necessary to present it while it was being so held: sec. 85, Bills of Exchange Act. All that Montgomery knew of the state of Ryan's account with the bank was what he learned in the proceedings in *Bank of Montreal v. Ashcroft*, in which he was the defendant's solicitor: *Lloyd v. Freshfield* (1826), 2 C. & P. 325, 329; *Re Chatham Banner Co., Bank of Montreal's Claim*, 2 O.L.R.

672. Ryan was not a customer of the bank at the time of the transfer to Montgomery. Any cause of action founded on the sale of the bank's claim with its collaterals is entirely distinct from the claim for violation of sec. 46. The evidence establishes the counterclaim by Montgomery in the second action.

G. H. Watson, K.C., and *N. Sinclair*, for Ryan, the respondent. The bank concealed from Ryan all knowledge of the negotiations and dealings with Montgomery, Shields, and Fowler. The bank had no power without proper notice to assign the securities and assets of Ryan. Such a transaction had never been known before, and was, from the standpoint of the bank, unnecessary; it was out of the ordinary course of business, and can be explained only by reference to malicious motives. There was, in fact, a conspiracy against Ryan. The exposure of his account was wanton and voluntary—a very different state of affairs from those disclosed in *Hannum v. McRae*, 18 P.R. 185. By certain enabling provisions of the Bank Act Amendment Act, 1900, such as secs. 33, 34, 65, and 66, the bank may sell certain assets, etc., but no other sales are permitted by the Act. There is implied a prohibition against the sale of other assets. The relation between the bank and the customer is not only that of debtor and creditor—it is a different and a higher relation. A bank have no power to sell and deal with an account as an individual might; that would ruin banking business; a rival in business might destroy a customer's business. The evidence shews that the transaction was not the sale of a negotiable security. It is inconsistent with sec. 46 of the Bank Act that any account should be sold. The bank might have sold the collateral securities—they stood in the names of Kirkland and Worrell. Upon the right of a bank to sell and the necessity for notice, see *Maclaren on Banking*, 2nd ed., pp. 136, 137; *Prentice v. Consolidated Bank* (1886), 13 A.R. 69; *Toronto General Trusts Corporation v. Central Ontario R.W. Co.* (1904), 7 O.L.R. 660; *Pigot v. Cubley*, 15 C.B.N.S. 701; *Stevens v. Hurlbut Bank* (1862), 31 Conn. 146; *Washburn v. Pond* (1861), 2 Allen (Mass.) 474. The bank are estopped from denying that the note was satisfied. The amount paid should be credited to Ryan. The findings of the trial Judge as to interest and the rate of interest and as to compound interest are supported by the evidence. In addition to the cases cited in the judgment,

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see *Bank of British North America v. Bossuyt* (1903), 15 Man. L.R. 266. There never was an agreement as to the rate of interest. The evidence displaces any inference from the course of dealing that there was an agreement. Ryan is not estopped by the signing of the monthly receipts: see cases cited by Clute, J. The damages are not excessive and will not be reviewed. Apart from sec. 46, there is a cause of action under the Criminal Code: see *Rex v. Elliott* (1905), 9 O.L.R. 648; *Rex v. Master Plumbers, etc., Association* (1907), 14 O.L.R. 295. The demand note sued upon was past due when transferred to Montgomery, and there was nothing then due upon it.

Shepley, in reply. There is nothing in the evidence to support the charge of fraud against Mr. Worrell or the bank. There is a clause in the judgment charging the bank with the amount of the Ashcroft judgment. The bank have passed that judgment away. As to compounding, Ryan assented to that for eight years.

Millar, in reply. Even if the contract is in part illegal, the part that is legal will stand: *Baker v. Hedgecock*, 39 Ch.D. 520, 522; Sm. L.C., 11th ed., p. 386. Although the bank may be punished in damages, the contract should not be annulled. The covenant is no necessary part of the agreement. We obtained all the information from the commission evidence taken before the agreement.

January 22. MACLAREN, J.A.:—In these two cases, which were tried together, the first questions to be considered are whether the act of the Bank of Montreal in disclosing to the plaintiff Montgomery the state of Ryan's account with the bank, was an unlawful act, and whether the covenant to "produce and exhibit the books of account and other evidence of indebtedness" was an unlawful agreement, and, if so, what are the consequences.

The trial Judge has found against the bank, and has, in consequence, dismissed Montgomery's action based upon the claim assigned to him by the bank.

The question as to the liability of a bank for such disclosure, in the absence of a statute, as in England, has been a debatable one, as will be seen from the cases of *Tassell v. Cooper*, 9 C.B.

509; *Foster v. Bank of London*, 3 F. & F. 214; *Hardy v. Veasey*, L.R. 3 Ex. 107.

In this case, however, at the time of the transaction in question, the Bank Act, 1890, was in force, sec. 46 reading as follows: "Inspection of books:—The books, correspondence and funds of the bank shall, at all times, be subject to the inspection of the directors; but no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank."

This section was based upon sec. 37 of the Bank Act of 1871, the last clause there reading, "but no shareholder not being a director shall be allowed to inspect the account of any person dealing with the bank."

The use of the word "shareholder" in the Act of 1871 gives weight to the suggestion made in *Hannum v. McRae*, 18 P.R. at p. 188, and in *Re Chatham Banner Co., Bank of Montreal's Claim*, 2 O.L.R. at p. 675, that it was originally intended to prevent a shareholder as a member of a banking corporation from asserting a right to inspect and examine at his pleasure the accounts of persons dealing with the bank.

We have, however, to consider the section as it appears in the Act of 1890, with the word "person" substituted for "shareholder."

Whatever may have been the intention of Parliament in enacting the original clause in the Act of 1871, I have no doubt that its intention in 1890 was to declare a policy of secrecy as to such accounts, except where there existed a good ground for disclosure.

This view is strengthened by other legislation that may be said to be *in pari materiâ*. With regard to post office savings banks, R.S.C. 1906, ch. 30, it is declared by sec. 13 that postmasters and other officers shall not disclose the name of any depositor or the amount deposited or withdrawn, except to the Postmaster General and those assisting him. This has been the law ever since 1875: 38 Vict. ch. 7, sec. 63.

However, as appears from the above cases of *Hannum v. McRae* and *Re Chatham Banner Co.*, the rule is not an absolute one. We have to look at the Bank Act and the law to see whether the circumstances of this case furnish a justification to the bank for the act and agreement complained of.

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Section 64 of the Bank Act, 1890, in force when the transaction took place, declared that the bank "may deal in, discount and lend money and make advances upon the security of, and may take as collateral security for any loan made by it, bills of exchange, promissory notes and other negotiable securities, or the stock, bonds, debentures and obligations of municipal and other corporations, whether secured by mortgage or otherwise, or Dominion, provincial, British, foreign and other public securities, and it may engage in and carry on such business generally as appertains to the business of banking."

It is to be noted that in this case the acquisition of the transferred securities by the bank is in no way attacked; it is only the assignment to Montgomery that is complained of.

I quite agree with the trial Judge that it is immaterial whether the transaction between the bank and Montgomery is looked upon as a sale or transfer of the debt or claim against Ryan or as a sale or transfer of the note. The assignment of the 16th July, 1906, treats it as a transfer of the debt, and the demand note was only handed over subsequently. I do not think that Montgomery can claim on the note as a holder in due course, but agree with the trial Judge that he took with notice, and has no higher rights than he acquired by the assignment: Bills of Exchange Act, 1890, sec. 29. He was well aware that the bank did not claim that the full amount of the face of the note was due. The note was for \$17,240, with interest at 6 per cent. from the 16th November, 1905; the bank claimed only \$12,789.24. The whole transaction shewed that he did not expect more than to stand in the place of the bank. No doubt, he was quite content to rely upon the covenant of the bank that there was due to it by Ryan the sum of \$12,789.24.

Had the bank a right to sell the claim, whether it existed simply as a debt, or whether it was evidenced by the promissory note? In my opinion, the language of sec. 64 of the Bank Act, above quoted, is quite ample to cover the transaction in question, including the securities which were collateral to the debt or note. The bank was authorized to "deal" in these securities. Now, "dealing" in them includes the right to sell as well as the right to buy them or to lend upon them. Indeed, the idea of selling or distributing is the primary meaning of the word rather than

buying or lending: see *Allen v. Sharp* (1848), 17 L.J. Ex. 209, 212. And, even if this special power was not given in so many words in the Act, I think it would also be covered by the concluding words, that the bank "may engage in and carry on such business generally as appertains to the business of banking." See Halsbury's Laws of England, vol. 1, p. 569.

It is common knowledge that banks, when in need of money, are accustomed to raise it by rediscounting their negotiable paper or by pledging their securities, and, so far as I know, their right to do so has never been challenged. If they may do it for this purpose, they may do it for any other lawful purpose. It is a mere question of policy, of which the bank itself must be the sole judge. I cannot see on what grounds the Courts can interfere with the exercise of such discretion. The practice is expressly recognized by the Bank Act, as schedule D requires every bank to state the amount of its "Loans from other banks in Canada secured, including bills rediscounted."

The bank, like another corporation or an individual, as assignors, and the plaintiff as their assignee, are fully entitled to the benefit of sec. 58, sub-sec. 5, of the Judicature Act, as to the assignment of a chose in action, and I can find nothing in the Bank Act or in our law to deprive them of any benefit to be derived from availing themselves of its advantages. See *Walker v. Bradford Old Bank* (1884), 12 Q.B.D. 511, at p. 516.

Any inspection which Montgomery may have had or for which he stipulated in the agreement, no doubt had special reference to the collateral securities which were to go with the debt or note. He would, doubtless, be quite satisfied with the covenant of the bank as to the amount that was actually due by Ryan; the facts relating to the collaterals, and the amount that he would probably be able to realize from them, was what would specially concern him.

Counsel for the respondent argued before us that the enactment of sec. 33 and following of the Bank Act Amendment Act of 1900, enabling a bank to sell their assets to another bank, is an indication that banks had not the power of sale claimed here by the appellant. It is well known that these sections were enacted to enable two banks to carry out a transaction then on foot, by which the smaller bank was merged in the larger, the stock of

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the latter being increased, and the shareholders of the former receiving the new stock in lieu of what they formerly held in the selling bank. A reference to the sections themselves shews that it was intended solely to meet the case of a bank selling out to another bank and retiring from business, and not a case like the present.

The reference to these sections is, however, somewhat instructive. If sec. 46 is to have the absolute meaning sought to be placed upon it by the respondent, then, even in a case where a bank is selling out to another bank, it would be prohibited from allowing the purchasing bank to inspect the account of a single customer of the bank.

To my mind, Parliament, having authorized these two ways of disposing of assets of a bank, recognized the fact that in one case as well as in the other no one would think of buying without inspection, and did not consider it necessary that special provision should be made for it in the Act. The fact that up to 1890 the prohibition referred only to shareholders, and not to ordinary prospective purchasers of assets, may have been a reason for the case not having been specially provided for. But, even if sec. 46 were to have the meaning claimed by the respondent, I am not prepared to admit that the consequences would be such as laid down by the trial Judge. However, in view of the opinion I have formed, it is unnecessary to pursue this farther.

The next question is that of interest. No agreement to pay any special rate of interest at the opening of the account is proved. The respondent says that nothing was said on the subject until the 9th February, 1904. From 1895 up to that time he had been regularly charged interest at the rate of 7 per cent., and this was duly entered in his pass book. Month by month he had, either personally or by attorney, confirmed the statements contained in the pass book and acknowledged receipt of all cheques and vouchers. The weight to be attached to such receipts has lately been considered by this Court in the case of *Rex v. Bank of Montreal*, 11 O.L.R. 595. It will depend on the facts and circumstances of each particular case. The length of time it has been going on, the opportunity the customer has of becoming acquainted with the facts sought to be held proved against him, the probabilities of the case, whether the bank have altered their

position in consequence of his action—these and other such matters are all elements to be taken into account. The question in many cases will be one of acquiescence or estoppel. In the present case we have something more. In at least one case, that of a letter of hypothecation of the 28th July, 1903, the respondent, on a loan of \$10,000, promised to pay interest at the rate of 7 per cent., and this rate is written in both figures and letters, and the very next line below has an erasure and correction in ink, shewing that the document was one prepared with considerable care. It does not appear that 7 per cent. was an unusual or excessive rate.

On the 9th February, 1904, the respondent says he had a conversation with the late Mr. Kirkland, then manager of the Bank of Montreal at Toronto, when he said to him: "You have been charging me an excessive rate of interest," and I said, "I want to be put on the best terms you have been charging any customer of this bank, for I am paying up honestly." "He said it would be all right; he would make that all right. I never had another word with the bank in my life, as far as I can remember."

Mr. Kirkland had died before the trial, so we have not his testimony; but he made an entry in the books of the bank reducing the rate of interest charged Ryan from 7 to 6 per cent., and in the pass book only 6 per cent. was charged after that time, and monthly receipts were given confirming the statement; but neither in the books of the bank nor in the pass book was there any entry reducing past interest, or allowing any rebate or credit for interest previously charged. This question was not raised until the present litigation.

On the evidence I think the proper conclusion to be drawn is that the bank are entitled to charge interest at the rate of 7 per cent. up to the 9th February, 1904, and 6 per cent. after that date.

The question of compound interest is, however, another matter. By sec. 80 of the Bank Act, 1890, "the bank . . . may stipulate for, take, reserve or exact any rate of interest or discount not exceeding 7 per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank."

I do not think under the facts of this case it can be said that

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Ryan ratified or acquiesced in a charge of compound interest, or that he is now in the same position as if he had paid it, and was seeking to recover it back. I think that the bank, or, rather, their assignee Montgomery, is now seeking to recover it from Ryan, and that they are precluded by this section from so doing. It may be, as said by counsel for the bank, that compounding the interest does not amount to as much as taking out the interest in advance (that is a mere matter of computation); but that is not the question. I do not think that on the facts of this case Ryan can be held liable for compound interest, or that there is sufficient in the evidence to bring it within the cases of *Mosse v. Salt*, 32 Beav. 269, and *Lord Clancarty v. Latouche*, 1 Ball & B. 420.

In this action of *Montgomery v. Ryan*, the appeal should, therefore, be allowed and judgment given in favour of the plaintiff, with a reference to take the accounts, if the parties cannot agree upon the amount.

As to interest, the rate should be 7 per cent. up to the 9th February, 1904, and after that 6 per cent. There should be no compound interest, but where the bank have made a discount or an advance for a specified time and have reserved the interest in advance this may be allowed. In other cases, where there has been an overdraft, and payments have been made, interest shall be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus that may remain to the discharge of so much of the principal: see *McGregor v. Gaulin* (1848), 4 U.C.R. 378; *Barnum v. Turnbull*, 13 U.C.R. 277; *Bettes v. Farewell* (1865), 15 C.P. 450.

The appellant should have the costs of the action and the appeal; costs of the reference and further directions reserved.

Applying the principles above set forth to the second case, *Ryan v. Bank of Montreal*, the result is that, as the Bank of Montreal were within their legal rights in assigning their claim, the plaintiff has no ground of action against them, inasmuch as they have not committed any actionable wrong against him. I do not think it is within our province to inquire or pass upon whether or not the bank treated the plaintiff with the consideration due to a customer by a bank. Our intervention is shut off by the fact that there

is no injury to him of which the Courts can take cognizance. By the assignment Montgomery obtained against Ryan no greater right or claim than was possessed by the bank. At all times since the assignment Ryan had the right to demand and obtain from Montgomery all his securities for exactly the same amount as he could obtain them from the bank. He has not to pay a single dollar more; so that I cannot see how he has been damnified.

For these reasons I think the defendants' appeal in this case also should be allowed and the action dismissed with costs.

In this second action the defendant Montgomery, by way of counterclaim, asks that the plaintiff Ryan be restrained from assigning or dealing with a certain mortgage given by the Metropolitan Soap Co. to the plaintiff, and also with certain debentures of the Cape Breton Coal and Development Co. standing in the name of the plaintiff, and all of which were by him handed over to and held by the bank as collateral to the plaintiff's indebtedness, but as to which the plaintiff had not executed formal assignments or transfers, and the defendant further asks that the plaintiff be now ordered to execute the same.

In the argument before us, little, if any, stress was laid upon this claim, attention being directed chiefly to the more important matters in dispute. As the transfer to Montgomery was declared illegal and void by the trial Judge, the counterclaim, although not specially dealt with in the formal judgment, would naturally fail as a consequence of the general ground taken in the court below.

The evidence shews that these securities were handed over as collateral by Ryan to the bank, although no written assignment or transfer was made. They were subsequently handed over by the bank to Montgomery, and the assignment by the bank to him entitles him to be placed in the position of the bank with respect to these as well as the other securities. He is entitled to the assignment he asks for, and his appeal should be allowed as to his counterclaim, and Ryan should execute the assignment and transfer asked for.

MOSS, C.J.O., OSLER and GARROW, JJ.A., concurred.

MEREDITH, J.A.:—In *Montgomery v. Ryan* an extraordinary result has been reached by extraordinary means. The defen-

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dant is admittedly the maker of the promissory note upon which the action was brought, and admittedly is indebted to a large amount upon it; and the note was, before action brought, duly transferred to the plaintiff; yet the action has been dismissed with costs. It will not, however, do to say off-hand that such a result cannot have been rightly reached, however much inclined one may be to do so; for, after a very patient, if not long-suffering, hearing of an unduly protracted trial, and after taking time for consideration, the learned trial Judge has reached his conclusions, and has taken pains to set out, at very considerable length, his reasons for them.

It ought hardly to be needful to say that such a result could not have been reached except upon extraordinary legislation requiring it. It has not been held, or contended, that it could: the judgment, and the contention for the defendant, rest wholly and solely upon the effect of sec. 56 of the Bank Act, R.S.C. 1906, ch. 29, which, at the time the note was transferred to the plaintiff, was in these words:—

“The books, correspondence, and funds of the bank shall, at all times, be subject to the inspection of the directors, but no person, who is not a director, shall be allowed to inspect the account of any person dealing with the bank.”

Before the transfer of the note by the payees, who are a bank within the meaning of that word as used in that section of the Bank Act, they permitted the plaintiff to examine the account of the maker of the note in the books of their branch office at which the maker had or had had a bank account. These books were, of course, the proper means of ascertaining the amount due upon the note, a matter of vital importance to any purchaser of the note.

The learned trial Judge held that permitting the plaintiff to see the defendant's account, in the books before mentioned, was an infraction of the provisions of the Bank Act, which I have read; and that, as a consequence of such infraction, the transfer of the note was invalid; and he therefore directed that judgment be entered dismissing the action. I am quite unable to agree in his premises, or in his conclusion from them.

The section is collocated in a group of three, under the heading “Annual Statement and Inspection,” but the words of the

sub-section are not of general import; they are limited to the inspection of particular accounts. It is, however, impossible to give them their full literal meaning if "inspection" includes examination and seeing, for that would prevent even the manager of the branch, or the clerks whose duty it is to keep the books, or the general manager, from all oversight of it, and would exclude also the bank's inspector, and all litigants and Judges and jurors and others, who could never have been intended to be included in the term "no person;" and so, too, it would exclude the customer whose account it is, and who might have no other means of proving payments made, or other defences to an action against him. It is obvious that it is not to have any such absurd effect; the line must be drawn somewhere; one object of the enactment may have been, as suggested by Street, J., in *Re Chatham Banner Co., Bank of Montreal's Claim*, 2 O.L.R. 672, "to do away with the right of a shareholder of the bank to inspect the books;" and another may have been, as suggested by the trial Judge, to put at rest the law upon the subject as between banker and customer. Assuming that both of these reasons actuated the Legislature, where is the line to be drawn? Obviously, I would have thought, at any inspection which is unjust and injurious to the person "dealing with the bank." The result would be that an inspection, permitted by the bank, would give a cause of action to the person, against the bank, if the disclosure were made without lawful justification or excuse, and were injurious to the "person." But, in such a case as this in which it was necessary and proper, no action can lie. Assume that the books had not been looked at, and the defendant had been sued, just as he has been in this action, can it be contended that the books could not have been used by even the defendant in his defence, or even the plaintiff, in so far as they might be admissible in evidence in his behalf; and, if so, can it be that either party would be precluded from looking at them before the trial? There was, in my opinion, no breach of the provision in question, in disclosing to the purchaser of the note the account upon which the amount of the claim he was buying rested. The extraordinary effect of the judgment in this respect condemns it, for, under it, if the bank had dishonestly abstained from revealing the fact that the whole amount of the note was not due, and had sold it as if it were, the

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defendant would have been liable in this action, and liable for more than he owed; the penalty for acting in an honest and business-like manner, instead of dishonestly, is the loss by the plaintiff of all right to recover and the costs of the action; and by the bank a penalty of \$1,000 and the costs of another action. So that the ways of honesty have led but to condemnation, and condemnation of a very costly character. An unfortunate lesson for the Courts to impart.

And, again, there is very much to be said against the view that the defendant was, at the time in question, "a person dealing with the bank:" he was then rather a mere debtor, from whom the bank were unable to obtain payment of the money due to them, and with whom dealing as bankers had ceased.

But, if this were not so—if the trial Judge's premises were true—is it not quite illogical to say that, because of such an infraction of the Act, it necessarily follows that the transfer of the note was invalid? If invalid in the hands of the transferee, it should be equally so in the hands of the transferor, and so the debtor would be very easily relieved from his debt. Nothing in the Act gives any warrant for such an extraordinary result. If any legal wrong were done the defendant in the disclosure of the state of his account, his remedy would be in an action for damages, the proper measure of which would be the loss which the wrong done had really caused him.

I cannot but think that the learned Judge was dealing with the question as if it had arisen, and was in controversy, between the plaintiff and the bank, and one or other of them was seeking to avoid the transaction between them on the ground of illegality; but his conclusion was erroneous, in my opinion, for three reasons: first, it was not in fact such a case; second, the transaction was not illegal; and, third, if it had been, the Courts would not aid either party, but would leave them in the position in which they had placed themselves.

I have no doubt that the plaintiff should have had judgment for the amount due upon the note, and so that this appeal should be allowed, and there should be a reference, if necessary, as to the amount due, for which the plaintiff should have judgment when it has in due course been ascertained.

The learned trial Judge gave expression to the view that:

"It is difficult to imagine anything more likely to shake public confidence in our banks than the knowledge that customers' accounts are open to inspection and sale. Great injustice might be done by exposing the private affairs of a customer and selling his account to an avowed enemy or one who desired to use his information as a 'lever' for private ends, as was admitted in this case."

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Though quite unnecessary for the consideration of this case, it may be as well for me to say that I can feel no good cause for alarm in the simple assignment of a debt, whether the creditor happens to be a banker, a wine merchant, a grocer, or any one else. Since the enactment giving effect to assignments of choses in action, at law as well as in equity, they have become the commonest every-day sort of transaction, and I am unaware of any sort of outcry against, or objection to, that remedial legislation, but, to the contrary, it has proved useful and commendable. Why should the bankers, in this instance, have been deprived of a legal right which is accorded to every creditor? Why should they not have been at liberty to assign the debt in order to obtain payment of it, and the more so a past due debt of which they were unable to obtain payment from the debtor. Customers' accounts are not open to sale; it is customers' debts which are, whether they are due to tinker or tailor or banker or candlestick maker, and the assignor, whether tinker, tailor, or banker, or any one else, not only may, but ought to, give all the information in his power to put the assignee in as good a position to collect the debt as that in which he would be himself.

In regard to the rate of interest, if that question be open to the defendant, it would, I think, have been quite as well to have left that to be worked out in the Master's office, in the taking of account there, which may be necessary for the ascertainment of the amount now due upon the note; but, as it has been dealt with by the trial Judge—although he dismissed the action altogether—it is necessary that it should be considered upon this appeal, again assuming it to be open to the defendant; and in respect of it also I am quite unable to agree with the trial Judge in his conclusions. The question is simply, what was the agreement, expressed or tacit, as to the rate? Apart from any testimony upon the question, the inevitable conclusion must have been

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7 per cent., for during a period of upwards of ten years, in which there were very many loans made by the bank to the defendant, some of them of very considerable magnitude, that rate was invariably charged, and the defendant had his pass books, which made the rate plain to any one who took the trouble to ascertain it, and there were the usual monthly statements rendered by the bank shewing the balances from time to time, and the usual acknowledgments in writing from time to time of the correctness of such balances, signed by the defendant's duly authorized agent. It is not as if the defendant were an illiterate man, unaccustomed to banking or other business transactions. The transactions in question shew him to have been anything but such an one. Under all the circumstances, it seems to me that it would be a preposterous thing to rip up all these accounts, extending over so many years, on the ground that the defendant had never agreed to pay interest at the rate he had been charged and had paid for so many years, except upon very clear evidence of fraud or mistake. The acknowledgments from time to time signed by the defendant's duly authorized agent, appointed for the purpose of attending to such matters, would surely be enough to put upon the defendant the onus of proof of the impropriety of the charge; and that would be a very difficult undertaking in the face of the writings to which I have referred, and quite an impossible one in the face of one of the documents signed by the defendant, in which the rate of interest is plainly stated to be 7 per centum. Then, upon the testimony adduced at the trial, how does the matter stand? The defendant, when giving evidence in chief, in his own behalf, testified that there had been no agreement as to the rate of interest he was to be charged, and that when he found out that he was being charged 7 per centum compound interest he said to the manager of the bank, "You have been charging me an excessive rate of interest, and I want to be put on the best terms you have been charging any customers of the bank;" and that the manager said that "it would be all right, he would make that all right," the witness adding, "I never had another word with the bank in my life, as far as I can remember," meaning, of course, on the question of interest. The manager had died before the trial of the action, and so the Court is without the benefit of his testimony; but, about the time deposed to by

the defendant, he made an entry in the proper book reducing the rate of interest from 7 to 6 per centum from that time forward, and interest was charged accordingly. On the day following that upon which the defendant gave the testimony from which I have just quoted, he was cross-examined, and then went much further than he had gone in his examination in chief, testifying that he asked for a refund of excessive charges of interest, and adding that the manager had said what was equivalent, "it is done." But, although two years and six months elapsed between this agreement and the commencement of this action, no reduction of past interest was made, or attempted, or sought, to be made. The monthly balances continued to be made, and the plaintiff still had his pass books shewing from day to day the debits and credits of his account. His testimony, naturally enough, was not given in a clear and convincing manner; he was relying entirely upon his memory, and covering a period of about twelve years. To give effect to such testimony, against all the writings and all the circumstances and probabilities of the case, would be unreasonable. It seems to me to be so improbable as to be practically impossible to believe that the manager, a man of the highest integrity, would, after making an agreement to reduce and refund the interest for the past, and reduce it for the future, immediately proceed to make a false entry of his promise, and abstain entirely from taking any steps to carry out the more important part of it; and also highly improbable that the defendant would have permitted, without any sort of remonstrance, the entire failure to carry out that part of it, and would have gone on, from month to month and from day to day, just as if the whole transactions in regard to interest were as the bank now assert they were, and as every writing bearing upon the subject shews them to have been. Instead of satisfying the onus upon him, the evidence as to the transaction of February, 1904, strengthens the case against the defendant upon this question. The trial Judge seems to have thought that it was immaterial what the facts as to this agreement were, because, in any case, any promise in respect of past interest would be without consideration. Again, I am unable to agree; for the transaction might be, and was, I think, evidence of an agreement in the past to pay 7 per centum. If the real transaction were, as I find it to have been, an applica-

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tion for a reduction for the future of the rate which had been charged, and an application which was acceded to and carried out, it is conclusive against the defendant. Nor can I see why a compromise in good faith of a claim to the higher rate, in an agreement to pay it up to a certain date, and a lower rate thereafter, would be wanting in any legally binding quality; nor why a renewal of a loan at a lower rate would not be a good consideration for a promise to pay at a higher rate for the past. Without leaving entirely the firm ground of the writings and the probabilities, and building upon the shifting sands of "treacherous memory," the judgment in this respect cannot be sustained. I am clearly of opinion that it should be reversed.

Then, in regard to the defendant's complaint as to compound interest, if that subject be open to him in this action, I am again unable to agree with the trial Judge. By the 91st section of the Bank Act, banks are restricted to a rate of interest not exceeding 7 per centum; but they are expressly given power "to stipulate for, take, reserve, or exact any rate of interest not exceeding 7 per centum per annum," and "may receive and take in advance any such rate." It is, therefore, quite clear that upon a loan of, for instance, \$1,000 for one month, interest, after the rate of 7 per centum per annum, for one month, might be taken, and the interest thus obtained at once let out at interest again, and equally clear that on payment of the loan at the end of the month, another loan, for another month, upon the same terms, might be made, and so on from month to month, or for any other period; and it could surely make no difference if the form of payment were not gone through, but the note was renewed from time to time, and no difference whether the interest was actually paid or only charged to the borrower in his account with the bank. So, too, I can perceive no reason why either a borrower from, or lender to, a bank may not make a valid contract for the payment of interest and the addition of it monthly, or at any other periods, to the account so as to become principal and bear interest as such. There is no prohibition in the Bank Act, or otherwise by law, of such a course of dealing. It is one of the commonest kind in the present day, when ancient prejudices against interest upon interest have greatly lost their sway. The Act does not limit the interest which may be taken, or paid, by

or to a bank, to simple interest. What power have the Courts to do so? There must, of course, have been an agreement by the defendant, either express or tacit, to pay in the way he has been charged; but, as there is nothing extraordinary or unusual in the method of charging, the conclusion that there was such an agreement is, under all the circumstances of the case, easily reached; indeed, I cannot but think that it would be futile to attempt to bring any juror of ordinary experience in business matters to any other conclusion. How can one, in the face of all the documents, in the face of over ten years' experience, with the pass books always in hand, and with the monthly statements received and acknowledged to be correct, and in the face of the fact that the promissory note in question was deliberately given, made for the balance due from the defendant to the bank, based upon such calculations of interest as well as the other items of the account of the bank against the defendant, how can any one but conclude that the defendant, or his duly authorized agent, was aware of, and agreed to pay, the interest thus calculated and charged? Is the mere memory of the defendant, of which he himself naturally and voluntarily shewed doubt in the words "as far as I can remember," to outweigh everything, and to outweigh everything in a case where the hand of death has excluded the testimony of the other party to the transaction, who, in view of the entries made by him as to the rate of interest, it can fairly be assumed, would have supported the propriety of the charge by his oath that they were in accordance with the defendant's agreement with him? see *Hill v. Wilson* (1873), L.R. 8 Ch. 888, at p. 900.

The trial Judge seems to have treated the case as if there had been an expressed agreement to pay interest merely, and so the statutable rule should be applied; but that is contrary to the whole evidence. The defendant's testimony was that there was no agreement as to interest, and that, except as to his complaint about being charged an excessive rate of interest and the manager's statement that he would make it right, he never had another word with the bank in his life on the subject, but, as I have before mentioned, guarding that testimony with the saving words "as far as I can remember." On the other hand, all the writings and circumstances go to prove an agreement to pay at

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the rate of 7 per centum down to the time of that complaint, and afterwards 6 per centum. If the question had been raised soon after the transactions between the bank and the defendant began, what would have been the proper findings on these questions of interest, even if the entries in the books, and all the other circumstances, be left out of consideration, and the defendant's testimony alone be accepted? Could any other conclusion be come to than that the tacit agreement of the parties was that the defendant should pay interest, and that the rate should be the same as the bank usually charged upon such transactions? The defendant knew that the bank had power to stipulate for and exact interest not exceeding the rate of 7 per centum per annum; and to take it in advance, and immediately to let it out again, to the defendant or any other borrower, at the like rate, and so to take interest upon interest. He knew, too, that the bank would exact all that it could lawfully take, and its customers would pay; and he could not have expected any better terms than others in the like position got. He must have meant, and the bank must have meant, that he should pay the usual rate charged by the bank in transactions of this kind, just as if he had bought from some large dealer any commodity without any agreement as to price. No other finding could reasonably be made in this case, if it had arisen when and as I have stated. And the whole evidence upon the subject is that at 7 per centum, with interest added as it was to his account, the defendant was so charged; and that the charges were reasonable ones, having regard to the character of the loans.

But, assuming the trial Judge to have been quite right in his conclusions on these subjects, how can that affect the plaintiff, who is the lawful holder in due course of the promissory note sued on? He had notice that payments had been made which reduced the amount of it; that is, he had seen the maker's account with the bank, and so knew all that it disclosed; but there was nothing so disclosed which cast any doubt upon its validity. It appeared to be a promissory note given by a gentleman of intelligence and business experience for the balance which he owed to the bank for money lent to him, the debt being secured by the several pledges which were assigned to the plaintiff. In these circumstances, how can the defendant escape payment of

the balance due upon the note, to such a holder? The actual transfer of the note before action, for its full value, before payment had been demanded, is proved and not denied.

This appeal should, in my opinion, be allowed, and judgment should be entered for the plaintiff for the amount now due upon the promissory note sued on, such amount to be ascertained by the proper officer of the Court, if the parties are unable to agree upon it. The plaintiff should have his costs of the action, and of this appeal, from the defendant.

RYAN V. BANK OF MONTREAL AND MONTGOMERY:—For the reasons which I have expressed in the case of MONTGOMERY v. RYAN, this appeal should, in my opinion, be allowed, and the action dismissed.

If the defendants the Bank of Montreal had, as I have no doubt they had, the right to transfer the promissory note in question, and to assign the securities which they had for its payment, and to permit all necessary and proper examinations of their books and papers in connection with the transaction, it is quite immaterial what the motives of any of their officers, or what the motives of the transferee, or of any one for whom he was acting, may have been. The most malevolent motives do not prevent the exercise of a legal right; nor do the most benevolent motives make that legal which is illegal. But, if motives were material, I would be quite unable to agree with the trial Judge that there was something sinister or malevolent in the acts or intentions of any of the defendants' officers, or of their solicitor. Why impute any such motives to gentlemen of the highest standing in their business and profession, and especially so when a very apparent motive, not in the least reprehensible in any sense, existed. The plaintiff was unable or unwilling to pay the large sum which he owed to the defendants. His account had become an inactive and undesirable one. Why should not the officers of the defendants be anxious to procure payment, and close an unsatisfactory state of affairs, without loss, in any way in which they lawfully might? It seems to me to be but wasted energy to inveigh against transferee or transferors because of motives or purposes, whether fancied or real. No motives could confer any higher rights to the transferee than those which the plaintiff had conferred upon

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the transferors, and conferred upon them with the right, which all creditors have, of assigning the debt. The plaintiff had but to pay his just debt, and retake his securities, to be quite free from either transferors or transferee and all their motives, whether evil or good, so far as the things in question in this action are concerned. One thing very much relied upon as indicating an evil mind toward the plaintiff on the part of the defendants' officers, and which at first sight might to many seem unfair conduct on their part, was their refusal to accept from the plaintiff, in part payment of his debt, the value of one of the securities the defendants held, and re-assign to him that security. This security had, or seemed to have, some extrinsic value; both the plaintiff and the proposed transferee of his indebtedness seemed to be anxious to acquire it. In these circumstances, it would have been simply silly, from a business point of view, to part with it at its face value, if the creditors had a right to retain it; and why might they not consolidate their securities, quite apart from any agreement giving them a right to retain each for the payment of the whole debt? Not to have used this desired security as a lever for the lifting of all that was owing to the defendants, would have been folly on the part of defendants' officers, and a dereliction of their duty: and it would have been a like folly and dereliction to have abstained from securing payment of the debt, by means of a transfer and assignment of the plaintiff's obligation and securities, merely because the plaintiff did not like, or feared the motives of, the transfer and assignee. Banking is a business; the defendants were creditors, not benevolent Quixotic friends, of a customer unable to pay the debt which he owed them.

E. B. B.

[DIVISIONAL COURT.]

STANDARD BANK OF CANADA V. STEPHENS.

Promissory Note—Subscription for Share in Company—Fraud—Note of Subscriber Transferred to Bank—Holders in Due Course—Hypothecation of Securities—Powers of Company—By-law—Resolution—Indorsement by Secretary—Sufficiency—Negotiation of Note.

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The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note shewed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorizing the borrowing of money, following the words of sec. 49 of R.S.O. 1897, ch. 191. It was also resolved by the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking be deposited in said bank account; that the same might be withdrawn therefrom by cheque, bill, or acceptance in the name of the company, over the names of any two of four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half:—

Held, that the by-law was sufficient to authorize the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.

Judgment of MACBETH, Co. C.J., affirmed.

APPEAL by the defendant from the judgment of MACBETH, Co.C.J., in favour of the plaintiffs in an action in the 1st division court in the county of Middlesex.

The facts appear in the written opinion of the county court Judge as follows:—

July 26. MACBETH, Co.C.J.:—The action is on a promissory note for \$20 dated the 15th January, 1906, made by the defendant,

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payable to the Farmers Manufacturing and Supply Company Limited, or order, 8 months after date. On the margin are the words, "Given for one share Farmers Supply Co." It is indorsed: "Pay to the order of the Standard Bank of Canada. Farmers Mnf. & Supply Co. Limited, A. N. McIntosh, secretary;" all of the indorsements, except the signature "A. N. McIntosh," being made with a rubber stamp. It appears that the plaintiffs are or claim to be the holders of a very large number of \$20 notes said to have been transferred to them under the same circumstances as the note now in question, so, as I thought that there should be a right of appeal from my decision, the parties accordingly consented that there should be an appeal. There is no conflict of evidence.

The defendant was called by the plaintiffs; he admitted that he gave the note; that he agreed to subscribe for and take one share of the capital stock of the Farmers' Manufacturing and Supply Company, Limited, of the par value of \$20, for which he gave this note. I find that Staples, an agent of the company, induced the defendant to subscribe for the share and give the note, by the false and fraudulent representation that the company had made arrangements with all the leading manufacturers which would enable shareholders in the company to procure whatever they needed at one-third less than the ordinary retail price.

In answer to this the plaintiffs set up that they are holders in due course, for value, without notice of any fraud. As each of these points is stoutly contested by the defence, I think it best to set out the facts, so far as they are disclosed by the evidence.

The Farmers Manufacturing and Supply Company Limited were incorporated under R.S.O. 1897, ch. 191, the Ontario Companies Act, on the 16th November, 1904, for the purpose of manufacturing and dealing in goods and merchandise, with an authorized capital of \$100,000, divided into 5,000 shares of \$20 each. On the 24th November, 1904, the directors passed a by-law for the borrowing of money, in which they followed the words of sec. 49 of ch. 191, R.S.O. 1897. An entry in the minute book of the company stated that this by-law was, on the same day, confirmed by the annual meeting of shareholders. There was also passed by the directors and confirmed by the shareholders on this same 24th November, 1904, a resolution that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the com-

pany, and usually deposited in the ordinary course of banking, be deposited in said bank account, and the same may be withdrawn therefrom by cheque, bill, or acceptance in the name of the company, over the names of any two of the following, *viz.*, president, vice-president, secretary, manager, and that, for all purposes connected with the making of deposits in said bank account, the signature of any one of said officials be sufficient.

By memorandum of the 20th February, 1905, over the seal of the company and the hands of the president, secretary, and manager, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness.

The defendant's note, indorsed as above stated, was delivered to the plaintiffs at their Durham branch on the 12th February, 1906. This was shewn by the entry in the plaintiffs' collateral ledger, which was produced, and from which it appeared that paper to a very large amount was handed over from time to time by or on behalf of the company to the plaintiffs.

In February, 1906, the company owed the plaintiffs \$12,000; in April, 1907, the indebtedness had increased to \$39,000. In June, at the date of the hearing, it was said to be \$29,000, for which the plaintiffs held as security notes given by the company's customers for goods and by subscribers for shares. McIntosh, who indorsed the note in question to the plaintiffs, was a director of the company and secretary for 18 months. During that time he indorsed, in the name of the company, a very large number of notes, which were transferred by him for the company to the plaintiffs. Livingston, the manager, states that the secretary had authority to indorse, that, if present, he indorsed all notes for transfer to the bank, but, if he happened to be absent, the manager would indorse for the company, and that all the directors knew that the secretary indorsed notes to the plaintiffs. This is all the evidence as to the authority of McIntosh to indorse the note in question to the plaintiffs to be held as collateral security. I should infer that the resolution of the 24th November, 1904, was assumed to empower any one official to indorse by way of deposit as collateral.

Notwithstanding Mr. Meredith's forcible argument, I think I must hold that the by-law of the 24th November, 1904, was sufficient to authorize the hypothecation of the company's securities to

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secure the present and future indebtedness of the company to the plaintiffs. The latter were certainly not bound to inquire whether the meeting of shareholders to ratify the by-law was duly convened, whether there was a quorum, etc.: *Royal British Bank v. Turquand* (1856), 6 E. & B. 327; *Masten's Company Law*, p. 191. I do not see why the authority to pledge the property of the company to secure any indebtedness should be restricted to existing indebtedness. There can be no doubt that under sec. 49 of ch. 191, R.S.O. 1897, there may be a valid pledge of assets as general running security for a bank account, and it seems to me that the by-law was intended to authorize the doing by the directors of whatever may lawfully be done by by-law under that section. Moreover, I think I might hold, if needful, that the plaintiffs, in arranging with the company's directors for an advance of money on collaterals, are not bound to call for a by-law empowering the directors to pledge the assets. See the cases cited in *Masten*, p. 161—although the author expresses grave doubt on this point.

I have no doubt that the indorsement over the signature of McIntosh was sufficient to pass the property in the note in question to the plaintiffs.

I should be inclined to hold, if necessary, that the resolution of the 24th November, 1904, is sufficient to authorize the secretary to indorse, in the name of the company, the notes intended to be pledged to the plaintiffs. It would certainly empower him to indorse notes in order to deposit them in the bank for collection, and, if deposited for any purpose, the bank would have the right to hold them under the agreement of hypothecation. But, apart from this, assuming that the directors could lawfully pledge the company's assets, there can be no doubt that the secretary was the person put forward by them to carry out such pledging from time to time. There is no suggestion that any other person was deputed to do it, and it cannot be questioned that the directors sanctioned the doing of it by McIntosh, when it is shewn that he did it almost daily, with their knowledge, for a year and a half. I think, therefore, that the indorsement by McIntosh was valid and sufficient to make the plaintiffs the holders of the note in question. See *Thorold Manufacturing Co. v. Imperial Bank* (1887), 13 O.R. 330; *Imperial Bank v. Farmers Trading Co.* (1901), 13 Man. L.R. 412; *Daniel on Negotiable Instruments*, 2nd ed., p. 319.

It is, therefore, in my view of the case, unnecessary to consider the company's resolution of the 20th May, 1907, which purported to ratify all prior indorsements. I may say, however, that if the indorsement by McIntosh were in fact unauthorized, then I do not see how any note so indorsed by him could be said to be negotiated prior to the ratification of such unauthorized indorsement: secs. 60, 61, Bills of Exchange Act; *Whistler v. Forster* (1863), 14 C.B. N.S. 248. The plaintiffs knew, when this resolution was passed, that the defendant and many others repudiated the notes given by them to the company.

John Kelly, the plaintiffs' manager at Durham, and Livingston, manager of the Farmers Manufacturing and Supply Co., were examined at length with the object of shewing that the plaintiffs did not take the note in question in good faith and without notice of any defect in the title of the company. The facts disclosed by such examination appear to me to be as follows:—

Prior to November, 1904, the Durham Manufacturing Co. carried on the manufacture of cream separators. Livingston was manager, and Kelly was a director and had \$4,225 invested in it. The company were not prosperous, and a change was necessary. Accordingly, the Farmers Manufacturing and Supply Co. was formed, and purchased the assets of the Durham Company. All the terms of the purchase are not disclosed, but it seems that the new company purchased the business on credit, and assumed the payment of the Durham Company's debts to the plaintiffs. Kelly has since received \$2,400 on account of his investment, apparently from moneys paid for the Durham Company's assets. It is not clear whether he expects to get any more. Kelly took 5 shares in the Farmers Manufacturing and Supply Co. It is not shewn that he has any part in the management of the latter company. Kelly knew that in 1905 and 1906 the Farmers Manufacturing and Supply Co., with the object of increasing their capital and extending their business, employed agents to offer their shares for sale. He knew that for each subscription of one share the agent would usually take the subscriber's note for \$20. About 600 of such notes (including the defendant's note) were from time to time transferred by the company to the plaintiffs. Kelly knew that these notes represented subscriptions for stock. He did not know and did not inquire whether shares had been allotted and notice of allotment

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given to the subscribers. Kelly did not know, and, so far as the evidence goes, had no reason to suspect, that these notes or any of them were obtained by fraud.

A minute book was produced containing a by-law or resolution of the directors of the company, allotting shares to a large number of subscribers, including the defendant. It was, I think, of a date earlier than the 12th February, 1906. Livingston says that notice of allotment was sent to each subscriber. The defendant says that he never received notice. One Hodgins, who subscribed for one share, wrote to Kelly making inquiries as to the company, and in reply Kelly wrote him on the 18th January, 1906, the letter produced (exhibit 7), which was put in without objection, though written without prejudice. On the 20th March, 1906, Kelly gave Livingston the paper marked exhibit 6. This was given because an agent of the company was reported to have absconded after disposing of notes obtained from subscribers for stock, and the report was injuring the company. There is no doubt that exhibit 6 was intended to assist the company in selling shares or goods. Kelly says the statement in exhibits 6 and 7 were true, when made, to the best of his knowledge; there is no evidence that they were untrue. Other notes were obtained by the company's agents by the same sort of misrepresentation as was made to the defendant.

Livingston says that the company shewed a large surplus at their last stock taking, and thinks they are not now insolvent, though embarrassed by financial stringency and by the difficulty with their bankers, arising out of the trouble over these \$20 notes.

On this evidence it is suggested that the Farmers Manufacturing and Supply Co. was formed with the fraudulent design of unloading upon that company the assets of the Durham Company and getting notes from farmers under a pretended co-operative scheme to secure the bank and pay off the shareholders of the Durham Company.

I do not adopt this suggestion. I think that the promoters of the Farmers Manufacturing and Supply Co. proposed to induce a very large number of farmers to become interested as shareholders, each for a trifling sum, in the company, expecting that these farmers would be customers of the company, and that in filling their orders for goods at a trifle over the manufacturers' prices, there would be a saving of the selling agent's commission, which, in some lines of farmers' supplies, is very large, and in any

district in which a large number of shareholders should be obtained, it was proposed to establish a branch store.

Whatever an experienced business man might think of the ultimate success of such a project, I do not think there was anything improper or dishonest in its inception. There is no evidence to lead one to suppose that, so far as Kelly knew, it was anything but a legitimate business venture. And I do not think Kelly had the slightest suspicion that the \$20 notes were obtained for an improper purpose or in an improper manner, or that there was any defect in the company's title thereto, or any reason why the plaintiffs ought not to take them as collateral for the company's bank account.

One point taken for the defence is that under the Companies Act the Farmers Manufacturing and Supply Co. have not the right to take promissory notes for subscriptions of stock, much less to negotiate them. For this is cited *Pellatt's Case* (1867), L.R. 2 Ch. 527, and it is urged that it is contrary to the principle of the Act that a liability to pay calls on shares should be converted into a liability to pay a note to a third party.

In *Re Pakenham Pork Packing Co.*, *Galloway's Case* (1906), 12 O.L.R. 100, Galloway applied for shares, and it was arranged that he should give his promissory note for the amount of his application, payable 12 months after date. It would seem from the judgments given that, if his application had been properly accepted by the directors, and if they had been in a position to give him what he had applied for, the transaction would have been valid and binding. The same may be said of *Higginbotham's Case* (1906), before the Court at the same time, 12 O.L.R. 112. See also *Ottawa Dairy Co. v. Sorley* (1904), 34 S.C.R. 508; *Manes Tailoring Co. v. Willson* (1907), 14 O.L.R. 89; *Bullion Mining Co. v. Cartwright* (1905), 10 O.L.R. 438 (the last case having been on a note given for mining shares); 10 Cyc. 469, 470.

I have not yet found any case in which an action was brought by the indorsee of a promissory note given for a subscription of stock, but I do not see any reason at present why such a note should not be negotiated. I think the plaintiffs in the present case were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company for such share, and that the company had the right to negotiate it. This is the conclusion to which I have come at

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present, and I do not think that I should delay my decision any longer. I would hold that the defendant never received any notice of allotment, so that the contract between him and the company was not completed, and that the note in question is, therefore, without consideration. But I do not think this affects the plaintiffs, as, in my opinion, they became holders in due course of the note in question, and there should be judgment in their favour.

In refusing the defendant's application for a new trial, the learned Judge referred to and distinguished *First Natchez Bank v. Coleman* (1903), 2 O.W.R. 358; citing also *Power v. Hoey* (1871), 19 W.R. 916; *Fischer v. Borland Carriage Co.* (1906-7), 8 O.W.R. 579, 9 O.W.R. 193; *Pure Colour Co. v. O'Sullivan* (1907), 10 O.W.R. 313; Thompson's Commentaries on Corporations, vol. 2, secs. 1657-8; Am. & Eng. Encyc. of Law, 2nd ed., vol. 26, p. 841.

The appeal was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 2nd March, 1908.

T. G. Meredith, K.C., for the defendant. The Judge found that the note was obtained by fraud and was made without consideration, but that the plaintiffs were not affected. The onus was on the plaintiffs to shew that they were holders in due course: Falconbridge on Banking, p. 454. *Wilson v. Lockhart* (1907), 10 O.W.R. 148, has now been reversed by the Supreme Court of Canada: *Lockhart v. Wilson* (1907), 39 S.C.R. 541. The plaintiffs were put on inquiry by the circumstances, and ought to have known if they did not know of the fraud and want of consideration. There was no proper transfer of this note by the company to the plaintiffs: *First Natchez Bank v. Coleman*, 2 O.W.R. 358; *Imperial Bank v. Farmers Trading Co.*, 13 Man. L.R. 412; Masten's Company Law, p. 161. There was no power under the by-laws of the company to hypothecate this note: *Kelly v. Electrical Construction Co.* (1907), 10 O.W.R. 704; *Traders Bank v. White* (11th November, 1907), a decision of a Divisional Court of the High Court of Justice for Ontario (not reported). The company had no right to accept a note in payment of stock: *Pellatt's Case*, L.R. 2 Ch. 527; *O'Sullivan v. Donovan* (1906), 8 O.W.R. 319; *Ottawa Dairy Co. v. Sorley*, 34 S.C.R. 508.

G. S. Gibbons, for the plaintiffs, relied on *Thorold Manufacturing Co. v. Imperial Bank*, 13 O.R. 330; *Bridgewater Cheese Factory Co. v. Murphy* (1896), 23 A.R. 66; and referred to some of the other cases cited in the judgment of the county court Judge.

March 9. PER CURIAM:—We all agree with the conclusions of the learned county court Judge in his very able judgment, and have nothing to add to what he has said.

The appeal will be dismissed with costs.

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[IN THE COURT OF APPEAL.]

FAULKNER v. GREER.

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1907

Damages—Wrongful Removal of Timber from Lands—Subsequent Bonâ Fide Sale—Rights of Original Owner.

Dec. 23.

The husband of the plaintiff conveyed certain land to his wife for valuable consideration. Previously, but without his knowledge or that of the plaintiff, certain timber was wrongfully cut and removed therefrom. The wrongdoers sold some of the timber to the defendants, who purchased *bonâ fide*, and subsequently sold the same to another *bonâ fide* purchaser. The plaintiff thereupon brought action against these two purchasers for damages, and for a declaration that as against them she was entitled to the proceeds of the timber. The second purchaser obtained leave to pay the purchase money into court, and an issue was directed to determine the rights to it as between the plaintiff and the first purchaser:—

Held (reversing the judgments of the Divisional Court and affirming the judgment of the trial Judge, reported 14 O.L.R. 360), that the plaintiff was entitled to recover the whole of the purchase money.

The timber was the plaintiff's property where she found it, and she might have laid hold upon it in specie subject to no right or claim of lien or recoupment on the part of the wrongdoer, and the purchaser stood in no different position.

Per MEREDITH, J.A.:—The plaintiff had at the time of the trespass no title to the timber, but an amendment of the interpleader order and issue should have been allowed, adding the husband as co-plaintiff, and such amendment should be made now.

THIS was an appeal by the plaintiff and a cross-appeal by the defendants from the judgment of the Divisional Court in this action reported 14 O.L.R. 360.

The appeal was argued on November 15th, 1907, before Moss, C.J.O., and OSLER, GARROW, MACLAREN and MEREDITH, J.J.A.

G. F. Shepley, K.C., and *C. A. Moss*, for the plaintiff, contended that even if J. and C. Greer were the purchasers in good

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faith of the logs in question, yet their title could be no better than that of the original trespassers: *Union Bank v. Rideau Lumber Co.* (1902), 4 O.L.R. 721; that the proceeds of the sale in this case stood in the place of the lumber itself for the purpose of having the ownership determined, though, no doubt, the issue might have been framed so as to leave the question open which the defendants were here raising: *McWilliams v. Dickson Co.* (No. 2) (1905), 6 O.W.R. 706; that all the logs were proved to be off the plaintiff's land, and that the only thing that remained was to award the money to the plaintiff; that under the issue here the Court could not say we will give the plaintiff so much by way of damages, and hand the balance over to the defendants; that if the money was handed over to the defendants, that would put the Barnett & McQueen Co. in the position of paying for the logs twice; that Clute, J., treated the issue as though it were an action of damages against the defendants; that the plaintiff never affirmed the sale to the Barnett & McQueen Co. by the defendants, as stated in the judgments below, but, finding the logs in the former's possession, was willing to make a sale on her own account to them; and that if the money could in any way be looked upon as the money of the defendants, J. & C. Greer, the plaintiff was entitled to recover it from them. They also referred to Clerk and Lindsell on Torts, 2nd ed., p. 348.

W. H. Blake, K.C., and J. T. Loftus, for the defendants, contended that the judgment at the trial would give the plaintiff not only the value of the logs, but the value of all the labour put into them; that the position of J. & C. Greer was that they bought the logs in good faith and sold them in good faith to the Barnett & McQueen Co.; that the defendants were not selling as agents for the plaintiff; that no case affirmed that an innocent purchaser who had sold to another the property which had been originally wrongfully taken and had parted with the dominium, could be attacked in respect to the purchase money received; that the money in court represented only the purchase money which the Barnett & McQueen Co. were to pay the defendants, and which the plaintiff was claiming; that the plaintiff was entitled either to all or else to none of the money in court; that the writ could not have been issued in trover, yet the effect of the judgment was to award the plaintiff the extreme limit of success which she could

have obtained in an action in trover: Keener on Quasi-Contracts, p. 159; that the defendants were only asking the purchase price, and had nothing to do with the logs in specie, and the only question was whether the agreed purchase price should be paid to the defendants or to the plaintiff; that even if the plaintiff could shew that she was entitled to damages to the full amount of the money in court, she could not recover on this issue, but was bound to shew that she was entitled to this money as the purchase money of the logs, by shewing that she was entitled to the logs themselves—that is, that she was entitled to recover against the defendants in an action of trover and conversion; that when the timber in question was taken from the land the plaintiff had no right whatever to it, and the subsequent conveyance could not give her such right; that there could not be an amendment of an interpleader issue; that if the plaintiff could virtually make the defendants her agents in respect to the sale of the logs, she was bound to reimburse them for their expenditure, and that it was only on such a basis of ratification that she could claim this purchase money; that she was invoking equity as distinct from common law, and, therefore, must do equity; that an owner of chattels has no claim against one of a line of innocent purchasers through whose possession the chattels have gone. They also referred to *Railway Co. v. Hutchins* (1877), 32 Oh. 571; *Peruvian Guano Co. v. Dreyfus Bros. & Co.*, [1892] A.C. 166; *Gordon v. Harper* (1796), 7 T.R. 9; *Pyne v. Dor* (1785), 1 T.R. 55; *Owen v. Knight* (1843), 5 Scott 307; *Smith v. Milles* (1786), 1 T.R. 475; *Pilgrim v. Southampton, etc., R.W. Co.* (1849), 8 C.B. 25; *Kent v. Ellis* (1900), 31 S.C.R. 110; *White v. Spettigue* (1845), 13 M. & W. 603; *Powell v. Rees* (1837), 7 Ad. & El. 426; *Peer v. Humphrey* (1835), 2 Ad. & El. 495; *Lamine v. Dorrell* (1706), 2 Ld. Raym. 1216; *Brewer v. Sparrow* (1827), 7 B. & C. 310; *Scott v. Surman* (1743), Willes 400; *Wood v. Morewood* (1841), 3 Q.B. 440; *Jegon v. Vivian* (1871), L.R. 6 Ch. 742; *Re United Merthyr Collieries Company* (1872), L.R. 15 Eq. 46; *Trotter v. Maclean* (1879), 13 Ch.D. 574; *Livingston v. Rawyards* (1880), 5 App. Cas. 25; *Smith v. Baechler* (1889), 18 O.R. 293; *Lamb v. Kincaid* (1907), 38 S.C.R. 516; Keener on Quasi-Contracts, p. 160 *et seq.*

Shepley, in reply, contended that the respondent's argument aimed at placing the plaintiff in the position of one who was suing

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for damages, whereas she was in no such position, but, finding someone in possession of her property, she was demanding that property, and that the law as to trover trespass and conversion was beside the point, the sole question being whether the plaintiff had established her title to the fund in court as being the proceeds of her timber: *Arnold v. The Cheque Bank* (1876), 1 C.P.D. 578; that an interpleader issue could be amended: *Bryce Bros. v. Kinnear* (1892), 14 P.R. 509; that the sole question in this case was, did the plaintiff own the logs, and if that was established in the plaintiff's favour, she must own the proceeds.

December 23. OSLER, J.A.:—This was an appeal by the plaintiff from the judgment of a Divisional Court varying the judgment of Magee, J., at the trial, and holding that the plaintiff was entitled to \$600 only, instead of to the whole of the moneys which had been paid into court under an interpleader order.

The question arose upon an interpleader issue, and the facts are not complicated.

The plaintiff was the owner in fee of a lot in the township of Mactavish, in the district of Thunder Bay, and she was also equitably entitled, on the grounds mentioned in the judgments below, from which I see no reason to differ, to a quantity of spruce and tamarack piles, which had been wrongfully cut thereon by persons named Dunn and Evoy, for the purpose of carrying out an agreement theretofore made by them with the defendants. The piles were delivered to the defendants on the lake shore at Black Bay, at a point not far from where they had been cut, and were afterwards rafted by them for the defendants, who towed them to Port Arthur, where they sold them to the Barnett-McQueen Co., Limited, for \$3,781.11, which was not disputed to be about their value there. The standing trees from which they were cut were found by the learned trial Judge to be of the value of \$600 or thereabout *in situ*. He also found that the defendants were ignorant of the plaintiff's ownership of the piles or where they had been cut, and had dealt with Dunn and Evoy as the owners. Before the purchase money had been actually paid over to the defendants the plaintiff discovered the theft of her property, and traced it to Port Arthur, and found it in the possession of the Barnett-McQueen Co., from whom she demanded possession or

payment of its full value there, warning the holders against paying over the purchase money to the defendants. Attempts to settle the differences between the parties having failed, the plaintiff brought an action against the Greers and Barnett-McQueen Co., claiming damages for cutting and taking her property or a declaration that she was entitled to the proceeds of the sale. Thereupon the Barnett-McQueen Co. applied for and obtained an interpleader order, by which it was directed that the plaintiff and the defendants should proceed to the trial of an issue in the High Court, and that the question to be tried should be whether at the time of the issue of the summons in the action the plaintiff was entitled to the proceeds of the piles in question. The Barnett-McQueen Co. were ordered to pay into court to the credit of the interpleader issue the alleged proceeds of the sale, being \$3,781.11, less their costs, and the action against them was thereupon to be discontinued.

The issue was framed in the terms of the order, and upon the trial the learned Judge held that the piles in question had been cut and removed from the plaintiff's lot; that they were her property in the hands of the defendants and of the Barnett-McQueen Co., and that the money paid into court was the proceeds of the sale thereof by the former to the latter. He further held that the plaintiff was entitled to the whole of such proceeds under the terms of the issue, and not merely to so much thereof as represented the value of the piles at the place where they were cut, or standing in the trees, before they were cut and manufactured into piles and transported to Port Arthur. The contrary view was taken by the Divisional Court, and the plaintiff's recovery was restricted accordingly to \$600.

As I have already said, I think the plaintiff was equitably entitled to the piles or timber in question, a title sufficient to maintain her claim under the interpleader issue, so far as that depends upon the ownership of the property. Looking at the recent case of *Canadian Pacific R.W. Co. v. Rat Portage Lumber Co.* (1905), 10 O.L.R. 273, 279, I doubt if we have power to amend the issue and interpleader order. But, as the case stands, I am of opinion, with great respect to the learned Judges of the Divisional Court, that the judgment of the learned Judge at the trial should be restored. If that judgment was not right, as I think it was, it

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should have been reversed altogether, and the cross-appeal should be allowed.

Whether, under the circumstances, an interpleader order ought to have been granted we need not now consider. The property, while in the defendant's possession and in that of the Barnett-McQueen Co., remained capable of identification as the property, and was the property, of the plaintiff, and might have been replevied by her, and, so far as appears, an action of detinue or conversion might have been maintained by her against either or both of them: see *Dickey v. McCaul* (1887), 14 A.R. 166, and cases there cited. I do not see how the order could have been made upon any other footing than that the plaintiff was ratifying and affirming the sale to the Barnett-McQueen Co.

The case now stands upon the interpleader order, which has not been appealed from, and the question is no longer one of damages, but of the right to the proceeds of the sale of the plaintiff's goods—in other words, to the purchase money which the Barnett-McQueen Co. had agreed to pay the defendants therefor. If that had been paid over to the defendants, it was open to the plaintiff to have sued them for it, thereby waiving the tort and affirming the sale: *Sherrington's Case*, Savile Rep., p. 40; *Rodgers v. Maer* (1846), 15 M. & W. 444; *Smith v. Baker* (1893), L.R. 8 C.P. 350; *Neate v. Harding* (1851), 6 Exch. 349; *Lythgoe v. Vernon* (1860), 5 H. & N. 180; and that is practically what has been done by the order and payment into court, instead of to the defendants direct, the right to it there depending upon proof of which party—the plaintiff or the defendant—was the owner of the goods which the purchase money represents. I see no reasonable ground for holding that in such a case as this more than in an action of replevin the wrongdoer's liability can be reduced to a mere matter of damages, or by deducting any increased value which his wrongful act in towing it to Port Arthur may have given to it. It was the plaintiff's property where she found it, which she might have laid hold upon in specie, subject to no right or claim of lien or recoupment on the part of the wrongdoer, and I do not see that the purchaser stands in any different position. I think the appeal should be allowed, and the cross-appeal, for the same reason, dismissed, and both with costs.

MEREDITH, J.A.:—This case seems to me to be one which is very simple in its character, and easily to be determined on elementary principles of the law relating to personal property, and one in which no mystification can arise, nor can there be any good excuse for much litigation over it, if we do not permit ourselves to be drawn away from the simple facts into a consideration of what the law would be if the facts were different.

A trespass to lands was committed, the trespasser cutting down standing timber and carrying it away in substantially its natural condition. He sold the timber to the defendants, who shipped it, in the same state, to Port Arthur, and there sold it to the Barnett-McQueen Co. The plaintiff followed the timber, which was yet in the same state, and demanded it from the Barnett-McQueen Co., who had not yet paid the defendants for it. The defendants denying the plaintiff's title, and their purchasers being yet in the fortunate position of not having paid for the timber, an action was brought by the plaintiff against the Barnett-McQueen Co., and on their application an interpleader order was made, directing that the price which they were to pay the defendants for it should be paid into court, and that the plaintiff and defendants should proceed to the trial of an issue to determine the title to it. The money was accordingly paid into court, and the issue has been tried and found in the plaintiff's favour.

I would have thought it quite plain—indeed elementary—that the trespasser acquired no title, against the landowner, to the timber, and that he did not, and could not, confer any title to his purchasers, nor did, or could, they to their sub-purchasers, if the landowner chose, as he did here, to retain and exercise his ownership and rights of such ownership. I speak of the plaintiff's husband, for he was, in my opinion, the owner, and all that was done was done by and through him, though in his wife's name, as I understand the facts.

That being so, the landowner was entitled to demand, and did demand, his timber; he did not demand nor had he any right to demand from the defendants, or from the purchasers from them, damages for trespass to his lands: the timber he was entitled to, and that he sought, and the money paid into court was substituted for it. Therefore the money he became entitled to

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in lieu of the timber, and so the judgment at the trial was, on the main question, right.

It may be hard upon the defendants that they should lose the cost of transportation. But *caveat emptor*. It would be harder still upon an owner if it were a case in which he would be obliged to bring his goods back again at his own expense. And it would never do if a worthless trespasser could cut down timber at his will, and confine the owner to its actual value, in its severed state, by merely making a sale of it to some one else. That is, nothing could be recovered from him because worthless; and nothing more from his purchaser than the actual value of the severed timber at the place where the trespass was committed.

I find it difficult to understand how it can be seriously argued that the landowner could not in replevin or detinue have recovered the timber, it being not only yet in a state in which it could be identified, but substantially in the same state in which it was removed from the owner's land, and, if so, why should he have less than its actual value in the hands of the last purchasers, upon whom the demand of it was made?: see *Hollins v. Fowler* (1874), L.R. 7 H.L. 757.

There was no waiver of any rights, nor any sort of estoppel from enforcing them, in this case.

The cases relied upon by the Divisional Court of actions against the trespasser, for damages for trespass to lands, cannot affect the question of an owner's right to recover his own property in specie.

I am, however, unable to agree with the trial Judge that the plaintiff had at the time of the trespass any title to the timber. Her husband had not conveyed it to her, and there is no evidence even that he was under any sort of binding obligation to convey it to her. The title to the timber was wholly in him, as well as all causes of action respecting it, as well as respecting the trespass to the land. But that is an objection of a purely technical character, for the husband is willing and desirous to be added as a co-plaintiff, and there is no reason why that should not have been permitted and done at the trial. The learned Judge there, sitting in Chambers, could and should have allowed an amendment to the interpleader order and to the issue to effectuate it. The real question was not

whether wife or husband owned the land, but was whether the timber was taken from their land or from land not the property of either of them. Precisely the same course of the action would have taken place if the husband or husband and wife had originally been plaintiff or plaintiffs. The amendments should, in my opinion, be made now.

I would allow the appeal, and restore the judgment directed to be entered at the trial, on the amendments being made, for it is not unimportant that the husband as well as the wife should be bound by these proceedings.

Moss, C.J.O., GARROW and MACLAREN, JJ.A., concurred in the result.

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[IN THE COURT OF APPEAL.]

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IN RE DUNCAN AND THE TOWN OF MIDLAND.

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April 25.

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Intoxicating Liquors—Local Option By-law—Municipal Corporations—Requisite Three-fifths Majority Obtained—Two Weeks Allowed for Scrutiny—Final Passing by Council Before Expiry Thereof—Refusal to Quash—Irregularities in Voting—Voters Depositing Ballots in Box—Publication of Notice—Computation of Time for—Council, whether Lawfully Constituted—Right to Inquire into—Knowledge of Council as to Required Majority—Necessity for—Ballot Boxes—Use of, for Voting for Other Objects—Voters' Lists, Preparation of—Containing More than Requisite Number of Voters—Appointment of Deputy Returning Officers and Poll Clerks—Illiterate Voters—Marking of Ballots—Irregularity—Result of Vote Not Affected—Oath, Useless Form of—Effect of—Public Harbour, Application of By-law to—By-law, Publication of—Whether True Copy—Words, Meaning of.

By sub-sec. (1) of sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, the Municipal Council may pass a local option by-law, provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act"; but by sec. 24 of 6 Edw. VII. ch. 47 (O.), if three-fifths of the electors voting on the by-law approve of it, the council shall within six weeks thereafter finally pass it, and that the duty so imposed may be enforced by mandamus or otherwise.

A local option by-law was submitted to the electors of the town of Midland, and, on the day following the voting, the clerk of the council declared the result of the voting, which was in its favour by the requisite majority. A week after, the council purported to finally pass the by-law.

Per OSLER and GARROW, JJ.A., in the Court of Appeal:—The provisions of the Municipal Act, as contained in secs. 369-374 as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared the result of the voting, but there being here the requisite two-thirds majority, and no attempt made to obtain a scrutiny, the only objection made being as to the faulty third reading, the passing of the by-law being a purely formal and ministerial act only, which the council could be compelled to do, nothing would be gained by quashing it.

Per MACLAREN and MEREDITH, JJ.A.:—The by-law could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks allowed for the scrutiny, so long as there was the three-fifths majority, there being nothing to prevent a scrutiny being had afterwards.

Moss, C.J.O., agreed in the result.

Judgment of the Divisional Court affirmed, and that of MULOCK, C.J., reversed.

Held by the Divisional Court, BRITTON, J., concurring in the result:—

- (1) No proceedings after the polling, such as summing up the votes, or a declaration by the clerk of the result of the voting are necessary.
- (2) Where a voter, instead of handing the ballot paper to the deputy returning officer, puts it into the box himself, but with the officer's approval, the vote is not invalidated.
- (3) In computing the three weeks required for the publication of the by-law, the word "week" is used in its ordinary signification, and includes Sundays and holidays.

Re Armour and Township of Onondaga (1907), 14 O.L.R. 606, approved of.

- (4) The question whether the council, when it passed the by-law, was properly constituted or not, will not be considered on a motion to quash.
Re Vandyke and Village of Grimsby (1906), 12 O.L.R. 211, followed.
- (5) Knowledge by the council, when finally passing the by-law, that the three-fifths majority has been obtained, is not essential.
- (6) The ballot-boxes used for voting on the by-law can properly be used for concurrent voting for other objects, the Act in no way restricting their use to voting on the by-law only.
- (7) Objections, that the voters' lists were not properly prepared; that the list for one of the polling divisions contained more than the requisite number of voters; and that certain deputy returning officers and poll clerks were not properly appointed, were overruled.
- (8) The declaration of inability to read or physical incapacity to mark the ballot is a pre-requisite to open voting, and its absence invalidates the vote, even though it is done with the consent of the scrutineers for and against the by-law; but the defect was immaterial, for, even if struck off, the result here would not have been affected.
- (9) A voter is not to be deprived of his vote by reason of the submission to him by the deputy returning officer of a useless form of oath.
- (10) The fact that a public harbour, which is subject to the legislative authority of the Dominion, was within the territorial limits of the township does not necessarily raise the presumption that the council intended the by-law to apply thereto, even assuming that the council had not power to do so.
- (11) The copy of the by-law as advertized was: "In every tavern, inn or other house of public entertainment," omitting the words "or place" between the words "other house" and "public entertainment," which were contained in the original by-law:—
- Held*, that the phrases "tavern, inn or house or place of public entertainment" and "houses of entertainment" were equivalent terms, and an objection that the copy published was not a true copy was overruled.

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THIS was an appeal from the judgment of the Divisional Court reversing the judgment of MULOCK, C.J., Ex. D., in the Weekly Court on a motion to quash a local option by-law of the municipal corporation of the town of Midland. The voting took place on the 7th of January, 1907. Upon the 8th of January the clerk of the council declared the result of the voting, and upon the 14th of January the council purported to pass the by-law. The clerk's certificate shewed that 477 votes were cast in favour of and 234 against the proposed by-law, the vote in its favour thus exceeding the required three-fifths majority.

The prohibitive part of the by-law was: "That the sale by retail of spirituous, fermented or other manufactured liquors is and shall be prohibited in every tavern, inn or other house or place of public entertainment in the said municipality, and the sale thereof, except by wholesale, is and shall be prohibited in every shop or place other than a house of public entertainment in the said municipality."

The motion in the Weekly Court was heard on March 6, 1907.

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J. B. MacKenzie, for the applicant.*F. E. Hodgins*, K.C., for the Town of Midland.

April 25. MULOCK, C.J.:—Objection is taken that the council had no power to pass the by-law until the expiry of two weeks after the declaration by the clerk. The question thus raised involves the consideration of the following statutory enactments authorizing the passing of local option by-laws, and regulating the procedure in connection therewith.

Sub-section 1 of sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, declares that every council may pass such a by-law, "provided that the by-law, before the final passing thereof, has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act."

Sub-section 4 of sec. 24 of the Act to Amend the Liquor License Laws, being ch. 47 of 6 Edw. VII., which repeals sub-sec. 2 of sec. 141 of the Liquor License Act, declares that "in case three-fifths of the electors voting upon such by-law approve of the same the council shall within six weeks thereafter *finally* pass such by-law, and this sub-section shall be construed as compulsory and the duty so imposed upon the council may be enforced at the instance of any municipal elector by mandamus or otherwise."

Sub-section 1 of sec. 141 of the Liquor License Act being still in force, reference must be had to the Consolidated Municipal Act, 1903, for the purpose of ascertaining the manner necessary in order to such approval.

The sections of the last mentioned statute bearing upon the subject are as follows:

Section 338: "In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall, except in cases otherwise provided for be taken for ascertaining such assent."

Section 369: "If within two weeks after the clerk of the council which proposed the by-law has declared the result of the voting, any elector who was entitled to vote upon the by-law applies upon petition to the county Judge after giving such notice of the application, and to such persons as the Judge directs, and shews by affidavit to the Judge reasonable grounds for entering into a scrutiny of the

ballot papers . . . the Judge may appoint a day and place within the municipality for entering into the scrutiny."

Section 370: "At least one week's notice of the day appointed for the scrutiny, shall be given by the petitioner to such persons as the Judge directs, and to the clerk of the municipality."

Section 371: "On the day and at the hour appointed, the clerk shall attend before the Judge with the ballot papers in his custody and the Judge upon inspecting the ballot papers, and hearing such evidence as he may deem necessary, and on hearing the parties, or such of them as may attend, or their counsel, shall in summary manner determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council."

Section 374: "In case of a petition for a scrutiny being presented, the by-law shall not be passed by the council until after the petition has been disposed of; and the time which intervenes between the presenting of the petition and the final disposal thereof shall not be reckoned as part of the six weeks within which the by-law is to be passed."

The effect of the amending sub-sec. 4 of sec. 141 of the Liquor License Act, above quoted, is to require approval of the by-law by three-fifths, instead of, as formerly, by a bare majority of the electors voting upon it, and to declare that the council may be compelled by mandamus or otherwise to pass the by-law so approved within six weeks after it shall have received such approval, but the amendment does not repeal the proviso to sub-sec. 1 of sec. 141, which declares that before the by-law is finally passed it shall have received the approval of the electors in manner required by the sections in that behalf of the Municipal Act.

Thus in the case of a local option by-law, the amending sub-sec. 4 of sec. 141 of the Liquor License Act is substituted for sec. 373 of the Municipal Act. The other sections referred to, namely, secs. 369, 370, 371 and 374, are left in full force, and the question is whether, having regard to these sections and the amending sub-sec. 4 of sec. 141 of the Liquor License Act, the council had power to pass the by-law at the time when they purported to do so, namely, within seven days after the clerk had declared to them the result of the voting.

The intention of the Legislature was, I think, that before the

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council acted upon the declaration of the clerk by "finally" passing the by-law an interval of two weeks should be allowed to the electorate within which to investigate the correctness of the declaration by applying for a scrutiny and that in the interval the by-law should remain in that stage which would enable the council to give effect to the finding of the Judge.

By sec. 371 the Judge "shall in a summary manner determine whether the majority of the votes given is for or against the by-law, and shall forthwith certify the result to the council."

I fail to see what useful purpose would be served by the Judge certifying the result if the council had already finally passed the by-law.

Whilst this section speaks of a "majority" of votes, it should, in the case of local option by-law, be interpreted to mean such majority as is in such case required by the statute.

Then the language of sec. 374, which declares that "in case of a petition for a scrutiny being presented the by-law shall not be passed by the council until after the petition has been disposed of," implies that the by-law has not been passed at the time when the petition is disposed of, and the concluding words of sec. 374 ("and the time which intervenes between the presenting of the petition and the final disposal thereof shall not be reckoned as part of the six weeks within which the by-law is to be passed") extending the time for passing the by-law, indicate that the disposal of the petition must precede the passing of the by-law.

Whether in fact a petition is presented within the two weeks seems to me immaterial. The electors are given that time within which to present it, and until the expiry of that time the by-law must not have been finally passed, otherwise it is impossible to give effect to sec. 374 should a petition be presented within the two weeks, but after the final passing of the by-law.

The Legislature evidently intended to afford the electors an opportunity for a scrutiny before the result of the voting became operative, and it did not, I think, contemplate empowering the council to defeat such intention by finally passing it within the two weeks and before a petition for a scrutiny should be presented; otherwise it would be a simple matter for any council, favourable to the by-law, with the assistance of a sympathetic clerk, to finally pass it before the electors had definitely learned the result of the voting or had been able to present a petition.

If such a passing were valid, the presentation of a petition thereafter for a scrutiny would be purposeless. The scrutiny might take place and shew that the by-law had not received the required majority, but the Judge's certificate to the council informing them of the result would not repeal the by-law. I am unable to discover any intention on the part of the Legislature to deprive the electors, in the case of a voting on a local option by-law, of a right to a scrutiny, or to make the clerk the only and final judge as to whether the by-law has or has not received the required statutory majority, and I am of opinion that a municipal council has no power to finally pass a local option by-law within the two weeks next after the clerk of the council has declared the result of the voting.

For these reasons the by-law is, I think, invalid, and should be quashed with costs.

Many other objections to its validity were taken, but, having reached the conclusion that the objection above dealt with is fatal, it is not necessary for me to consider the remaining objections.

From this judgment the town of Midland appealed to the Divisional Court.

On May 30, 1907, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, J.J.

F. E. Hodgins, K.C., for the appellants.

J. B. Mackenzie, for the respondent.

July 2. BRITTON, J.:—The main question upon this appeal is whether a municipal council "has a power to finally pass a local option by-law within the two weeks next after the clerk of the council has declared the result of the voting."

The municipal council having received a petition in writing, signed by at least 25 per cent. of the total number of persons appearing by the last revised voters' list of the municipality to be qualified to vote at municipal elections, were obliged to present a by-law to the council, and submit the same to a vote of the municipal electors. This was done, and the voting upon the by-law was pursuant to secs. 338 to 365 inclusive and secs. 367 to 374 inclusive of the Municipal Act.

In this case, because of 6 Edw. VII. ch. 47, sec. 24, sub-sec. 4

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(O.), three-fifths of the electors voting required to approve, that is a *sine quâ non* to the by-law going into effect.

If the by-law gets the approval of the required three-fifths of the legal votes properly polled after all the preliminaries prescribed by the Municipal Act have substantially been complied with, then the council is obliged, and within six weeks after the voting, to finally pass the by-law. In this case the voting took place on the 7th January, and the clerk of the council, on the 8th January, declared the result. On the 14th January the council finally passed the by-law. That was well within the six weeks, but it is said they should not have finally passed this by-law until at least after the expiration of two weeks from the declaration of the result of the polling, because any elector could, during that term of two weeks, present to the county Judge a petition for a scrutiny of the ballot papers, and, in the event of such petition being presented, the by-law should not be passed until after that petition had been disposed of, and it is expressly provided by sec. 374 that "the time which intervenes between the presenting of the petition and the final disposal thereof shall not be reckoned as part of the six weeks within which the by-law is to be passed."

It, perhaps, was the intention of the Legislature that the council should not in any case assume to finally pass the by-law until after the expiration of the two weeks allowed for asking for scrutiny of the ballot papers, but, if so, it is not so expressed by sec. 373 or any other section of the Municipal Act. Because it is not so expressed, because there is no limiting or prohibiting clause as to what was done, and as the formal final passing of the by-law cannot make the by-law good in substance and operative, if the scrutiny shews that the result of the voting as declared by the clerk of the council was not the true result to the extent of there not being three-fifths of the voters in favour of it, I think the by-law must be upheld.

Why the Legislature should have deemed it necessary, when a petition for scrutiny has been presented before the final passing of a by-law, to stay the hands of the council until the petition is disposed of, and yet should not have said that the final passing should not be until after the expiration of time for petition, I cannot say. It was probably an oversight—a sentence

in sec. 373 or 374 would have made plain what was really intended. There is nothing expressly to prevent the council doing as was done in this case, and if the doing of it cannot defeat the purpose of the Act, I cannot say that the doing of it is by necessary implication prohibited.

The learned Chief Justice is of opinion that passing the by-law before an elector has an opportunity to have his petition for scrutiny disposed of defeats the Act by imposing upon the people a by-law not really approved by the necessary three-fifths of the electors voting. I do not agree in this. The scrutiny may go on. If, in fact, the requisite majority have not approved of the by-law, it will be absolutely void.

I entirely agree with the Chief Justice that there was no intention on the part of the Legislature to deprive the electors of the right to a scrutiny, and to make the clerk the only and final judge as to whether the by-law has or has not received the required statutory majority, and it is because, in my view of it, what was done did not and could not prevent the scrutiny, that I think the by-law must be upheld.

As to the other objections, I agree in the result, with my brother Riddell, that these cannot prevail, and I agree also as to the disposition of costs.

RIDDELL, J.:—At the opening of the argument an objection was taken that the town corporation had waived the right of appeal. It appears that the judgment appealed from having been given 25th April, 1907, the council on 29th April, as it is said in deference to the opinion of the learned Chief Justice, passed a resolution that the by-law should now be read the third time, and thereupon purported to read the by-law the third time, and to pass it. The by-law was not then before the council, the original being in Toronto; and nothing was done but the bare form of affecting to read it and then declaring it passed. No by-law was signed or sealed upon that date or thereafter.

I do not think this is a waiver of the appeal, notice of which had been theretofore given, even if the council had the power to waive a right of this character. The cases as to waiver are collected in Holmsted & Langton, p. 1003; and I think that the act done here, not being done in any action or such as

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to signify conclusive acceptance of the judgment appealed from, does not destroy the right to appeal: *Phillips v. City of Belleville* (1905), 10 O.L.R. 178. Cases such as *International Wrecking Co. v. Lobb* (1887), 12 P.R. 207, in which the appellant has acted upon a judgment so as to derive some benefit from it, have no application. As at present advised, I think the council would have been wise had they passed the by-law with all formality *ex abundanti cautela*; but that we do not now decide,—the matter has not come before us for decision.

Upon the merits, I am unable to agree with the learned Chief Justice. It must not, I think, be lost sight of that the voters of each municipality are vested with the right of self-government to a very large extent, and that their wishes should be given full effect to, if at all possible. The Court should strive to do this; and should not be astute to find reasons for interfering with the result which should follow from a voting.

The Act 6 Edw. VII. ch. 47, sec. 24 (O.) (amending the Liquor License Act, R.S.O. 1897, ch. 245, sec. 142), in sub-sec. 4, provides that "in case three-fifths of the electors voting upon" a local option "by-law approve of the same the council shall within six weeks thereafter finally pass such by-law, and this sub-section shall be construed as compulsory and the duty so imposed upon the council may be enforced at the instance of any municipal elector by mandamus or otherwise." The duty of the council, then, is purely ministerial; if three-fifths of the electors voting approve, any defects in the manner of passing the by-law would, in my opinion, be of little consequence. The proviso in R.S.O., ch. 245, sec. 141 (1), is: "Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act." Let the by-law be approved of by the electors in the manner provided by secs. 338 *et seq.* of the Municipal Act, Consol. Mun. Act, 1903, 3 Edw. VII, ch. 19 (O.)—that is, by voting after such advertisement and other proceedings as are prescribed—let three-fifths of the electors, as a fact, approve in this way of the by-law, and the duty of the council is clear. I do not think that any proceedings after the polling are necessary, such as a

summing up or declaration by the clerk, as provided by sec. 364 or otherwise; if the voting, as a fact, has resulted in the statutory approval, the duty of the council is clear. Any proceedings taken after the polling may be of assistance to the council in determining the actual state of the poll; but I think that the council may assure themselves of this by any other means; and the validity of the final passing of the by-law will depend upon the fact of the result of the voting, and not upon the method of ascertaining such fact. There may be some doubt as to the application of secs. 367-374 to a by-law of this kind at all. I think there need be no declaration by the clerk of the council as to the result of the voting; and, consequently, the elector who might desire a scrutiny may be in a difficulty under sec. 369. But if these sections do apply, I am unable to accept the conclusion of the learned Chief Justice in holding that for two weeks after such a declaration, if it be made, the council cannot pass the by-law. There is no such prohibition in terms, and I do not think the prohibition should be implied. The whole purpose of a scrutiny would be to shew that the necessary three-fifths had not approved of the by-law; that being shewn at any time, the basis upon which the by-law rests, fails, the necessary prerequisite is found to be wanting (6 Edw. VII. ch. 47, sec. 24 (5) (O.)). The council are proved not to have had the power to pass the by-law they have purported to pass; the result will follow which follows in any other case of a by-law passed without jurisdiction; any action or proceeding under it would fail, and the by-law itself might be quashed by the Court. There would be no necessity of any repeal. That, it is argued, is forbidden by sub-sec. 6; as at present advised, however, I do not think that sub-sec. 6 applies to any by-law which has not in fact received the majority contemplated by the statute; and I think that there would be nothing to prevent a repeal of a by-law which had not received the proper majority, useless as that repeal would seem to be.

Even if the council are forbidden to repeal a by-law passed without jurisdiction, I cannot see that the by-law could, for that reason, be considered of any avail.

An objection was also taken that a number of voters, instead of handing their ballots to the Deputy Returning Officer, for him to put them in the ballot box, themselves placed them in the

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ballot box; and sec. 170 is appealed to. This provides that "No person who has received a ballot paper from the Deputy Returning Officer shall take the same out of the polling place; and any person having so received a ballot paper, who leaves the polling place without first delivering the same to the Deputy Returning Officer in the manner prescribed, shall thereby forfeit his right to vote; and the Deputy Returning Officer shall make an entry in the poll book, in the column "Remarks," to the effect that such person received a ballot paper, but took the same out of the polling place or returned the same declining to vote, as the case may be."

Had the section stopped with the words "forfeit his right to vote," the argument would have had some weight; but the remainder of the section shews that what was being provided against was the voter going away without voting or declining to vote. It never could have been intended that a voter who, upon the direction or with the approval of the Deputy Returning Officer, himself in good faith placed the ballot in the box, instead of handing it to the Deputy Returning Officer, thereby should disenfranchise himself. Section 204 cures this defect.*

Taking, now, the other objections in the order of the notice of motion. Objection 2: The statute sec. 338 (2) provides for publishing notice of the by-law for three successive weeks, and 338 (1) that the day "fixed for taking the votes shall not be less than three . . . weeks after the first publication of the proposed by-law." The first publication was 12th December, 1906, and the day of polling 7th January, 1907. It will be seen that three weeks elapsed from the first publication before the day of polling, if the word "week" be used in the ordinary signification. But it is argued that Sundays and holidays are to be excluded, and that 21 days must elapse excluding such days. I dealt with this objection and overruled it in *Re Armour and Township of Onondaga* (1907), 14 O.L.R. 606. Having read and

* Section 204. "No election shall be declared invalid by reason of a non-compliance with the provisions of this Act as to the taking of the poll or the counting of the votes, or by reason of any mistake in the use of the forms contained in the schedules to this Act, or by reason of any irregularity, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in this Act, and that such non-compliance, mistake or irregularity did not affect the result of the election."

considered again the cases cited by counsel for the respondent, I see no reason for changing my view there expressed. The cases cited are as follows, under the Temperance Act (1864), 27-28 Vict. ch. 18: *Re Coe and Township of Pickering* (1865), 24 U.C.R. 439; *Re Miles and Township of Richmond* (1869), 28 U.C.R. 333; *Re Brophy and Village of Gananoque* (1876), 26 C.P. 290; *Re Mace and County of Frontenac* (1877), 42 U.C.R. 70.

That Act provided, sec. 5, that "the clerk . . . shall . . . cause such by-law . . . to be published for four consecutive weeks . . . and also by posting up copies of the same in at least four public places . . . with a notice signed by him signifying that on some day within the week next after such four weeks, at the hour of ten o'clock in the forenoon . . . a meeting of the municipal electors . . . will be held for the taking of a poll . . ."

In *Re Coe and Township of Pickering*, the dates were: First publication, 12th January, 1865; polling, 7th February. Held, time too short, but that the last week ended 8th February.

In *Re Miles and Township of Richmond*: First publication, 2nd October, 1868; polling, 4th November. Held, that the first publication was bad, in that it stated the hour of polling at ten p.m., instead of ten a.m.; but it was further said that the first publication was good, having been made 9th October, the fourth week ended 6th November.

In *Re Brophy and Village of Gananoque*: First publication, 6th March, 1875; polling, 1st and 2nd April. Held, that this was not four weeks.

In *Re Mace and County of Frontenac*: First publication, 9th October, 1876; polling, 6th November. Held, that for those townships in which the first publication was on the 9th October the time was sufficient; but where, as in the township of Loughboro, the first publication was 10th October, or, as in the township of Oso, the 12th or 13th October, the time was too short, and the by-law was accordingly quashed.

Then there is a case of a by-law for a loan: *Re Armstrong and Township of Toronto* (1889), 17 O.R. 766. First publication, 30th November, 1888; polling, 7th January, 1889. Held, that this was three days after the expiry of the five weeks mentioned in the statute.

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Re Ostrom and Township of Sydney (1888), 15 O.R. 43; *Cross v. Township of Gladstone* (1905), 15 M.L.R. 528, are not in point.

Rickey v. Township of Marlborough (1907), 9 O.W.R. 930, does not assist upon this question in any way favourable to the attack upon the by-law. It seems to have been considered that a first publication on the 14th December, followed by polling day 7th January, would answer if the publication in other respects were regular.

I adhere to the opinion in the *Armour* case.

Objection 3: That the council were not a lawfully constituted body when finally passing the by-law, is fully met by the case: *Re Vandyke and Village of Grimsby* (1906), 12 O.L.R. 211; see *Re Armour and Township of Onondaga* (1907), 14 O.L.R. 606.

Objection 4: That the council had no knowledge of the by-law having been carried by a majority of votes, when assuming to finally pass it, is answered in the early part of this judgment, where it is considered that the validity or otherwise of the final passing by the council depends upon the fact of the vote having been cast, even though the fact be as stated in the objection, which cannot be said to be proved, in view of the affidavit of the clerk.

Objection 5: The same ballot boxes, poll books and voters' lists were made use of on the concurrent votings for water and light commissioners and public school trustees and said by-law. The statute does not forbid this. I cannot find that it is contra-indicated, and the case about to be mentioned indicates that the practice is unexceptionable.

Objection 6: No voters' lists, as required by the statute, were prepared or supplied to the Deputy Returning Officer. This is met by *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488, which shows the very wide application of sec. 204, even if there were a defect, which I am far from asserting.

Objection 7: The voters' list for polling sub-division No. 3 contained more than the lawful number of names.

The voters' list for this sub-division contains more than 300, but not more than 400 names of voters, and it is argued that 3 Edw. VII. ch. 19, secs. 535, 536 (O.), apply, so as to render this a fatal error. I do not think so. Sub-section (12) of sec. 536 gets over the difficulty, and, at the worst, sec. 204 is applicable: *Re Sinclair and Town of Owen Sound*, 12 O.L.R. 488.

Objection 8: That no deputy returning officer was legally authorized to conduct the polling.

The resolution providing for submission to the votes of the electors, passed 27th November, 1906, appointed the clerk as returning officer; Norman Clegg as deputy returning officer for the west ward; James Baker as deputy returning officer for the east ward, and Alfred Courtemanche as deputy returning officer for the south ward.

The by-law, as advertised, provided that William Clegg should be deputy returning officer for the west ward or public school division No. 1; James Baker for the east ward or public school division No. 2; and Alfred Courtemanche for the south ward or public school division No. 3. Clegg acted as deputy returning officer for public school division No. 1, and no objection is taken to him. James Baker was, apparently, unable—at all events, he refused—to act, and the clerk of the town, after consultation with the mayor, appointed William Geron to act in his stead. This is alleged to have been done under sec. 108, but it was done long before the time arrived for attending for instructions. Consequently, the provisions of this section have not been literally complied with; but this was the merest irregularity. It was known that Baker would not act as deputy returning officer, and, instead of going through the idle form of notifying him to attend for instructions and waiting for his non-attendance, and then appointing a substitute, the clerk acted at once upon the refusal. Such an irregularity is healed by sec. 204.

As to public school division No. 3, by-law No. 632 had appointed Alphonse Courtemanche deputy returning officer for this public school division for the municipal elections. This seems to have been a mere mistake for Alfred Courtemanche, and the resolution for submitting this by-law to the electors was correct. The name is printed Alfred Courtemanche in the by-law as published, and Alfred Courtemanche acted as deputy returning officer. I see nothing in this objection.

The case of *Re McCartee and Township of Mulmur* (1900), 32 O.R. 69, is cited against these two deputy returning officers. Since that decision the statute of 4 Edw. VII. ch. 22, sec. 8 (O.), was passed, but the provisions of this statute have not been complied with. Supposing *McCartee and Township of Mulmur* to

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have been well decided, I still think that the naming of the deputy returning officer is sufficient.

Objection 9: The poll clerks officiating at public school divisions Nos. 1 and 2 were not authorized to do so.

By-law No. 633, passed December 18th, appointed for the municipal election poll clerks George Gregory for public school division No. 1, and Wm. Geron, Jr., for public school division No. 2. Geron refused to act, and was appointed deputy returning officer in the place of James Baker, as has already been said. George Gregory was appointed in his place by the town clerk, after consultation with the mayor. Gregory thus becoming unable to act as poll clerk in No. 1, C. H. McMahon was appointed in his place in the same way. The Consolidated Municipal Act, 1903, sec. 106 (1), as amended by 5 Edw. VII., ch. 22, sec. 3 (O.), and 6 Edw. VII. ch. 34, sec. 5 (O), makes it the duty of the council of every local municipality in which an election for members of such council is to be held by by-law, to appoint the poll clerks who shall act as such at the respective polling places. The duties of the poll clerk are not defined. Section 165 (2) provides that the deputy returning officer may cause him to record the names, etc., of persons claiming to vote; sec. 174 (6) that the poll clerk (if any) shall sign the statement at the close of the poll; sec. 177 (2) that the deputy returning officer may make his declaration before the poll clerk, or the clerk of the municipality, or a justice of the peace; sec. 108 (3) provides that, in case of illness, etc., the returning officer or deputy returning officer becomes unable to perform his duties, the poll clerk shall act. It would seem of small importance that poll clerks should not be appointed at all in the ordinary case; and, in my view, even if poll clerks should have been appointed, sec. 351 directing such proceedings in a vote of this character, the facts that none was specially appointed for this particular by-law, and that a change was made afterwards in those appointed for the municipal election proper, form such an irregularity as is cured by sec. 204.

Objection 10: That no copies, or lawful copies, of the by-law were posted, etc., was, before the Chief Justice, not insisted upon, except to contend that they should have been put up outside. There is no substance in this objection, and the extended objection will be considered with 18.

Objection 11 is abandoned, as is Objection 12.

The first part of Objection 13 is substantially the matter secondly considered in this judgment, *i.e.*, as to the effect of sec. 170, and need not be further considered.

Then it is said that in public school division No. 1 “some half-a-dozen voters gave open votes; and in no such case was a declaration of inability to read or physical incapacity for the marking of the ballot made by the voter.” This is explained by the deputy returning officer as having been done by consent of scrutineers for and against the by-law; and what happened was that several persons who were unable to read had their ballot marked for them behind the screen, in the presence of both scrutineers. This was wrong; it is only those who make a declaration that they are unable to read who are entitled to have their votes cast in the manner mentioned: sec. 171. Some half-a-dozen are said to have voted in the same way in No. 3. If the number of persons thus voting had been large, it might be necessary to consider how far this defect was cured by sec. 204, but not more than about a dozen are claimed to have voted in this way. The vote was, in all, 711.

For the by-law.....	477
Against	234
	—
	711

To destroy the statutory majority 126 votes must be struck out, thus:

For the by-law.....	477
Struck out.....	126
	—
	351
Against	234
	—
Total valid votes.....	585
Three-fifths of 585.....	351

See *Re Armour and Township of Onondaga*, 14 O.L.R. 606, as to the proper method of calculating the effect of striking off votes.

Thus it appears unnecessary to consider the effect of sec. 204. One William Shaw is said to have been brought into the room

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and up to the table, for the purpose of receiving a ballot, by two persons said to be supporters of the by-law. It is not sworn that he voted, but I find a name William Shaw in the poll book for No. 3, which, I shall assume, shews that he did vote. If these persons acted as they are said to have acted, it was wrong; but the matter is a trifling one.

William Geron, Sr., was helped into the room by two persons; but it is sworn that that was because he had met with a severe accident and lost one leg, and the assistance was necessary; and it is further sworn that he went alone behind the screen to mark it.

Thomas Sharpe and his mother are said to have gone behind the screen together, the son having received both the ballots; but this is modified by the affidavit of the deputy returning officer, who says that each received a ballot separately and went behind the screen separately, although they were there at the same time. This irregularity is a trifling one.

Some 18 voters were sworn and voted. I cannot understand how the objection now taken to these votes can be given effect to: see Objection 17 below.

William Clegg, deputy returning officer of No. 1, received a certificate from the clerk of the town that he was entitled to vote, and voted accordingly. I held in *Re Armour and Township of Onondaga*, 14 O.L.R. 606, that a deputy returning officer has no right to vote upon such a by-law, and I adhere to that opinion. But this does not affect the result of the voting.

Objection 14 is not pressed.

Objection 15: A second ballot box illegally used to continue voting. Not now urged.

Objection 16: No declarations of secrecy. This shewn to be unfounded, unless it be considered that there must be separate voting, etc., for the by-law, and this has already been dealt with.

Objection 17: A worthless form of oath furnished the deputy returning officer, but this was the statutory form before 6 Edw. VII. ch. 34, sec. 11 (O); and no one can be deprived of his vote because the proper oath has not been administered to him. It might be different if it were shewn that the voters were citizens or subjects of a foreign power.

Passing over Objection 18 for the moment.

Objection 19: The Court below was not asked to deal with

it, having been introduced that the applicant might, if so advised, take advantage of it upon appeal.

The only matter now urged is that the by-law wrongly embraces the public harbour, legislative authority over which pertains to the Federal Parliament.

A somewhat similar objection was raised in the *Onondaga* case, and overruled—I still think rightly. The objection fails, even if, as I am far from asserting, the town cannot pass a by-law binding upon a public harbour.

Objection 18 reads: "That the by-law is bad, on its face, for not prohibiting the sale of liquor in places of public entertainment." In the written argument before the Chief Justice of the Exchequer Division counsel says: "Objection 18 was shewn, on the argument, to have been raised under a misapprehension." This arose in the following manner: the applicant Duncan, a day or two before he applied for a certified copy of the by-law, is said to have been informed by the son of the town clerk that a few of the sheets of the "Midland Argus," in which the by-law had been published, were left over, and that the certified copy which he would receive from the town would be certified on or from one of these copies; and upon applying for a certified copy, he received from the clerk one of these copies. It was upon the faith of the copy so furnished and certified that the motion was launched.

The copy reads: "1. That the sale by retail of spirituous, fermented or other manufactured liquors, is or shall be prohibited *in every tavern, inn or other house of public entertainment* in the said municipality, and the sale thereof *except, by wholesale*, is and shall be prohibited in every shop or place other than a house of public entertainment in the said municipality." The original by-law, when produced upon the argument before the Chief Justice, read: "In every tavern, inn or other house or place of public entertainment," and the punctuation was corrected to "sale thereof, except by wholesale, is and shall be prohibited." The original by-law being read by the Chief Justice, counsel for the applicant seems to have thought that the copies as published in the "Argus," and as posted throughout the municipality, were the same as the original, and, therefore, thought no objection could lie against the form. Upon discovering his error, he asks

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that we should give effect now to the objection that the by-law was not really published or posted at all, as an exact copy was not put out. It seems reasonable not to allow a mere inadvertence or mistake of counsel to deprive the applicant of any rights he may have.

The statute R.S.O. 1897, ch. 245, sec. 141 (1), provides: "The council of every township, city, town and incorporated village, may pass by-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors, in any tavern, inn or other house or place of public entertainment, and for prohibiting the sale thereof, except by wholesale, in shops and places other than houses of public entertainment."

The Legislature have used the double form, "prohibiting the sale by retail . . . in any tavern, inn or other house or place of public entertainment," and "prohibiting the sale . . . except by wholesale, in shops and places other than houses of public entertainment." These are not the same thing in terms, the former being aimed at the prohibition of retail sale in places of public entertainment, and the latter at the prohibition of sale by retail everywhere except in a "house of public entertainment." It is plain, I think, that the phrases "tavern, inn or other house or place of public entertainment," and "houses of public entertainment" are used as equivalent; and, therefore, the omission is immaterial. If "place of public entertainment" be included in the expression "house of public entertainment" (as I think), the words "or place" may be omitted without harm—if not, the latter part of the by-law, which prohibits the sale except by wholesale in every place other than a house of public entertainment, prohibits the sale by retail in such "place of public entertainment." After the passing of this by-law, anyone who kept a "place of public entertainment" and who sold liquor by retail would be placed in the dilemma, either this place is a "house of public entertainment" or it is not—if it is, the sale is forbidden by the former part of the by-law; if not, the sale is forbidden by the latter.

The omission is trivial, and should not affect the validity of the by-law.

Before us was raised the objection that there were two independent subject matters voted upon at the same time, as indicated above. But that is for the Legislature. Section 141,

above quoted, appears to permit this; and I can find nothing to indicate that the whole subject matter of that section may not be incorporated in one by-law, and be passed upon at the same time by the voters.

On all grounds taken, I am of opinion that the attack upon the by-law fails, and that the appeal should be allowed, with costs in this court and in the court below. As we, at the hearing, quashed the proceedings of 29th April, 1907, the costs of that order will be set off against the costs awarded under this order.

I have not thought it necessary to refer to more than a few of the numerous cases cited by counsel. I have read them all, however, and a few others—only a few; there were very few left.

FALCONBRIDGE, C.J., agreed with the opinion of Riddell, J.

From this judgment the applicant appealed to the Court of Appeal, the appeal being confined to the objection dealt with in the judgment of MULLOCK, C.J.

On November 22nd, 1907, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

J. B. Mackenzie, for the appellant. The learned Chief Justice of the Exchequer Division properly held that the by-law could not be confirmed until after the expiration of the two weeks for giving notice. Section 369 of the Con. Mun. Act, 1903, 3 Edw. VII. ch. 19 (O.), made applicable by sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, empowers an elector to demand a scrutiny, and gives him two weeks within which he may exercise his right, and this right cannot be exercised after the lapse of the prescribed time. He is thus driven to a motion to quash. This is clearly a disadvantage to him, for, while the decision on a scrutiny is final and conclusive, the motion to quash may be appealed to a Divisional Court, and, by leave, to the Court of Appeal. The right to a scrutiny is not taken away by the Act amending the Liquor License Act, 6 Edw. VII. ch. 47 (O.). There must be some person to determine how the voting has resulted. If the duty is not imposed on the clerk, then the clause in the by-law which imposes that duty on him and assigns representatives to attend upon the scrutiny is bad. This would ren-

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der the by-law bad, and would constitute a good ground for questioning it.

F. E. Hodgins, K.C., for the respondents. There is nothing in the statutes dealing with this subject which prevents the council from acting as they have done here. Notwithstanding the passing of the by-law, a scrutiny may still be had. No suggestion however, has been made that one was ever desired, or any steps taken to procure one, nor is it suggested that any loss has been sustained by the omission to get it. In fact, an inspection of the ballots would shew that a scrutiny would be useless. The objection, therefore, is of the most technical character. The passage of the 6 Edw. VII. ch. 47, sec. 24 (O.), has made a most important change. The test now is the three-fifths majority, and so long as there is, as a matter of fact, such majority, the council are given no discretion whatever, but must pass the by-law. Every precaution is taken to guard the rights of all parties interested. Sections 342 and 360 provide for everything being made known. There is no difficulty in obtaining a scrutiny. The applicant, by not applying for one, and taking these proceedings, has waived his right to one: *Wilson v. McIntosh*, [1894] A.C. 129; *Hardcastle on Statutes*, 3rd ed., p. 270. Where the by-law has obtained the requisite majority it cannot be repealed; but where it has failed to obtain such majority it is invalid, and if the council should pass it, it will be quashed: *Re Harding and Township of Cardiff* (1882), 2 O.R. 529; *Fleming v. City of Toronto* (1890), 29 O.R. 549. The principle applicable to an ordinary municipal election applies here. The fact of the successful candidate taking his seat and voting does not prevent a scrutiny being afterwards had: *Con. Mun. Act*, 1903, secs. 186-7, 259-60. The applicant's objection only applies to the third reading, and there is nothing to prevent a third reading being had now, the two weeks having elapsed: *Re Dewar and Township of East Williams* (1905), 10 O.L.R. 463. The Court, under these circumstances, will exercise their discretion by refusing to quash: *Re Hall and Township of Walsingham* (1852), 9 U.C.R. 310; *Sutherland v. Township of East Nissouri* (1853), 10 U.C.R. 626; *Boulton v. Town of Peterborough* (1858), 16 U.C.R. 380; *Canada Atlantic R.W. Co. v. City of Ottawa* (1885), 8 O.R. 217.

January 22, 1908. OSLER, J.A.:—Appeal from the judgment of a Divisional Court reversing the judgment of Mulock, C.J., quashing local option by-law No. 634.

The Liquor License Act, sec. 141, sub-sec. (1), enacts that the council may pass a "local option" by-law, to use the common expression, provided that before the final passing thereof it has been approved of by the electors "in the manner provided by the sections in that behalf of the Municipal Act."

The Act 6 Edw. VII. ch. 47, sec. 24 (O.), substituted a new sub-section for sub-sec. 2 of sec. 141, and enacts (in part) that if three-fifths of the electors voting upon the by-law approve of it, the council shall within six weeks thereafter finally pass it, and that the duty "so imposed" may be enforced by mandamus "or otherwise."

The proviso of sec. 141, sub-sec. (1), of the Liquor License Act, in my opinion, makes applicable to such a by-law as that now in question the enactments found in Title II., "Respecting By-laws," Division III., "Voting on by Electors," of the Municipal Act, so far as they apply generally to by-laws which are to be so voted on, such as the mode of submission, the voting by ballot and its time and manner, the poll, the manner in which the result is to be ascertained, the secrecy of proceedings, the scrutiny of the ballot papers, and the obligation of the council to pass the by-law when carried by the votes of the qualified electors voting thereon.

This obligation is found in sec. 373 of the Municipal Act, but that particular section has ceased to be applicable to the case of a local option by-law by force of the amendment of the Liquor License Act, sec. 141, introduced by 6 Edw. VII. ch. 47 (O.), above referred to, which, though not in terms referring to sec. 373, makes a new provision in that respect with regard to such a by-law, which must now be carried by three-fifths of the votes of the electors voting thereon, instead of by a bare majority, as is still the case as respects other by-laws, and when so carried it must be passed by the council within six weeks thereafter, though that obligation, the by-law having been so carried, is probably not different from what it was and still is under sec. 373 in respect of by-laws carried by a majority only.

This, as I understand his judgment, does not differ from the

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view expressed by Mulock, C.J., of the application of the Municipal Act, and I am unable to agree with the suggestion in one of the judgments below, that the provisions of that Act as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny do not apply to a by-law of this kind. Both of these are methods of ascertaining whether the by-law has in fact been approved by the electors. If the result, in the first instance for the purpose of fixing the obligation of the council, is not to be so ascertained, no method is provided by which that can authoritatively be done, and it would be most inconvenient, and a course which might lead to all sorts of difficulties, to say nothing of frauds, if the council were left to enter upon a roving inquiry or were obliged to take anyone's statement as to the result at the different polls, or if there should be no method of scrutinising the ballot papers in order to ascertain, if necessary, whether the requisite proportion of votes in favour of the by-law had or had not been given. Then, the result having been ascertained in the manner by law provided—viz., by the declaration of the clerk—what was the duty of the council? It was to pass the by-law within—not at any time within—six weeks after the voting. An absolute right is given to any elector to apply to the “county Judge” (meaning, no doubt, the Judge of the county court) within two weeks after the clerk of the council has declared the result of the voting, for a scrutiny of the ballot papers, for which he is bound to shew reasonable grounds, but he has that time, at all events, within which to make his application, and sec. 374 shews that if a scrutiny is granted, the time between the presentation of the petition therefor and the final disposal thereof is not to be reckoned as part of the six weeks within which the by-law is to be passed. If no petition is presented, the council has still four weeks within which to perform a very simple ministerial duty. If one is presented, the time is extended, but, reading the two enactments—the amendment of the Liquor License Act and sec. 374—together, it appears to me that, short of a prohibition in express terms, no plainer language could have been used to shew that, during the two weeks in which the scrutiny may be applied for, the council is to hold its hand, and is not to pass the by-law. Why should they, since in any case ample time is reserved in which they can do so regularly,

and must do so if there is no scrutiny or if a scrutiny does not alter the result. Whatever risks individuals may occasionally have run in accepting by-laws thus improperly passed, we are here concerned only with the meaning of the plain words of the Act, which no practice to the contrary can control.

In the present case the council passed the by-law—that is to say, gave it its third reading—too soon, but the question remains whether, under all the circumstances, the Court ought to interfere. What the council did is spoken of as the passing of the by-law, and if the by-law depended wholly upon the action of the council—that is to say, if it was *ab initio* and throughout the by-law of council—I should be of opinion that, in order to prevent it from being acted upon, it ought to be set aside as being plainly bad on its face. But I regard a by-law of this kind as essentially different from an ordinary by-law. It is a by-law which derives its force from the electors themselves, and not from the council, whose action in giving it a third reading is formal and ministerial only. They may be compelled to do this, and “the let alone lies not in their good will.” It is simply the formal authentication of the action of the electors, and the recording of it or adopting it for the purpose of proof or evidencing it in the way in which remedial legislation is usually evidenced. Here the carriage of the by-law by the electors is not attacked, nothing is complained of, or, rather, nothing could be set aside but the faulty third reading or formal passage of the by-law, leaving the council free (and obliged) to give it another and now unobjectionable one. It appears not only that no attempt was made to obtain a scrutiny of the ballot papers, but that they were, in fact, inspected and examined, and that only one was found to be defective. There is no evidence, in short, that a scrutiny would have had any effect in altering the result or that those opposing the by-law were in any way deterred from applying for one by the improper action of the council. We could not set aside or quash the by-law simply, as there is nothing wrong but its third reading, and to set aside that would now be a useless and futile proceeding.

I, therefore, think that the appeal should be dismissed.

GARROW, J.A.:—This is an appeal by the applicant from the

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judgment of a Divisional Court reversing the judgment of Mulock, C.J., upon an application to quash a local option by-law. Voting by the electors took place on January 7th, 1907, and seven days later the by-law was finally passed. The applicant contends that the council should have waited until the expiry of fourteen days from the declaration of the result by the clerk in order to enable a scrutiny of the ballots to be had, if applied for pursuant to sec. 369 of the Consolidated Municipal Act. And to this contention effect was given by Mulock, C.J., who made an order quashing the by-law, with costs. The Divisional Court reversed this order, apparently chiefly upon the ground that the statute 6 Edw. VII. ch. 47, sec. 24 (O.), had, in the opinion of that Court, materially altered the law by imposing upon council the imperative duty of passing the by-law, if duly approved by three-fifths of the electors, within six weeks, under pain of mandamus and other proceedings. Riddell, J., with whom Falconbridge, C.J., concurred, was of the opinion that a declaration of the result by the clerk was now unnecessary, as were also any other formal proceedings after polling, if the voting, as a fact, had resulted in the necessary statutory approval. If that were so in fact, then the council was bound to pass the by-law, and could do so at once, upon satisfying themselves of the result by any other means, and that any defect in the manner of passing would be of little consequence.

Britton, J., laid less stress upon the statute before referred to as having changed the law, and, as I understand, chiefly proceeded upon this, that there is nothing in the statute affirmatively prohibiting the council from giving the by-law its final reading without waiting for the expiry of the two weeks allowed for scrutiny.

In view of the number of such by-laws coming before the public, the point is one of considerable importance, justifying, I think, a somewhat close examination of the statutory provisions in question.

R.S.O. 1897, ch. 141, sec. 141 (1), provides that the council . . . may pass by-laws prohibiting the sale by retail of spirituous, fermented or other manufactured liquors in any tavern, etc., provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the

manner provided by the sections in that behalf of the Municipal Act.

These latter words, in my opinion, introduce all the provisions of the Municipal Act relating to taking the votes of electors upon by-laws requiring their assent.

Turning now to the Consolidated Municipal Act, 1903, we find "Division III.," under the heading "Voting on by Electors," devoted from beginning to end to this subject. Section 338 provides: "In case a by-law requires the assent of the electors of a municipality before the final passing thereof, the following proceedings shall, *except in cases otherwise provided for*, be taken for ascertaining such assent." Then follow minute directions respecting publication, notices, polls, voting, secrecy, ballots, etc., and providing explicitly for a summing-up and a declaration of the result by the clerk, who really acts in the well-known character of returning officer in such cases as he does in municipal elections.

Section 369 provides for a scrutiny of the ballot papers upon an order to be obtained from the county Judge within two weeks after the clerk has declared the result. Sections 370, 371, 372, relate to procedure on the scrutiny. Under sec. 371 the Judge is to forthwith certify the result to the council. Section 373 provides that "A by-law which is duly carried by the vote of the qualified electors shall within six weeks thereafter be passed by the council. Provided, however, that where a by-law which the council has been legally required, by petition or otherwise, to submit to a vote of the electors, is duly carried, it shall be the duty of the council within six weeks thereafter to pass the said by-law." The so-called proviso (I would not call it a proviso) was taken from the statute passed in the same year (1903), ch. 18, sec. 81. Section 374 provides that "in case of a petition for a scrutiny being presented, the by-law shall not be passed by the council until after the petition has been disposed of, and the time which intervenes between the presenting of the petition and the final disposal thereof shall not be reckoned as part of the six weeks within which the by-law is to be passed."

So far, then, in the case of any ordinary by-law requiring the assent of the electors, the procedure seems to be about as plain as language can make it. In such cases there shall be a summing-

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up and a declaration by the clerk of the result. And there shall also be a scrutiny before a Judge at the instance of any elector who applies for it within two weeks from the clerk's summing-up. And the Judge shall report the result to the council. And the council then, and only then, in my opinion, are so fully and finally informed of the result of the voting that they may take the final step of passing the by-law. True, as remarked by the learned Judges in the Divisional Court, there is no express prohibition against passing the by-law without waiting for the lapse of the time in which to obtain the scrutiny, but the course intended and pointed out by the statute to be followed is so clearly otherwise that it, in my opinion, amounts to an implied prohibition. Six weeks are allowed within which to pass the by-law.

Two weeks of this time are allotted within which to obtain the scrutiny, during which no action is to be taken, leaving four weeks within which to prosecute the scrutiny and obtain the Judge's certificate and final action by the council. And under sec. 374 the time occupied by the scrutiny is not to count.

If the Judge's certificate shews less than the requisite majority, the council have no power to pass the by-law. And if it shews otherwise, the council would have no option but to pass it under the very definite language of sec. 373 before quoted. The whole machinery is entirely devoted to obtaining in a reliable way the assent of the electors. But the elector must assent in a particular way—namely, by secret ballot—and the result of the balloting must be checked and tested in the methods pointed out in the statute, methods well known and approved in all our municipal and parliamentary elections, and from which there is nothing to indicate that local option by-laws were intended to be exempt. Once the by-law is finally passed, the council is *functus officio* as to it; and to require the Judge to certify a result to the council after the by-law had ceased to be under its control would be simply a stupid and meaningless proceeding not to be lightly attributed to the Legislature.

Then, has the statute 6 Edw. VII. (O.), to amend the Liquor License Act, altered the law as to the mode in which the assent of the electors is to be obtained and verified? In my opinion and with deference, I think it has not; that, in fact, there is not a word in the latter statute incapable of being perfectly harmonised

with each and every of the provisions of the Municipal Act to which I have referred, as was, I think, the plain intention of the Legislature. These provisions are, it must be remembered, quite as much the law as the Liquor License Act and its amendments. And they apply to the case of every by-law requiring the assent of the electors, unless other provision is made, and in this case no other provision is made.

It is not the case of retarding or of thwarting or otherwise interfering with the will of the majority, but simply of ascertaining the fact that there is such a majority. The successive steps in its progress are the balloting, the summing-up of the result by the clerk who acts as returning officer, and the scrutiny, if asked for. And then, when the time for it is passed, or when the result of the scrutiny, if there has been one, is certified to the council by the Judge, and not till then, final action by the council to give legal effect to the result by either passing or not passing the by-law, as the legally ascertained result of the voting determines. All that 6 Edw. VII. ch. 47, sub-sec. 4 (O.), upon which so much reliance was placed in the Divisional Court, really does is to declare that a three-fifths majority shall be necessary, instead of an ordinary majority, and to add some words to the already peremptory language of sec. 373 before quoted. It made the matter no stronger than it was before to say the duty should be compulsory, and might be enforced by mandamus, etc. But even if it did, how could that have the effect of inferentially dispensing with such important and outstanding provisions as those relating to the summing-up and report by the clerk and a scrutiny. Surely, if that had been intended, we would have had more explicit language.

So far, therefore, I agree with the conclusions of Mulock, C.J. But it does not, I think, necessarily follow that the by-law should be quashed.

The material before us shews that the total vote cast was 711, of which there were 477 for and 234 against the by-law, a majority for of considerably over the three-fifths required by the statute. So far as appears, no one applied for a scrutiny within the two weeks after the clerk declared the result. And it does appear that upon an inspection of the ballots subsequently held, at the

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instance of the applicant and in the presence of his solicitor, no irregularity of any consequence was found.

The objection is thus reduced to one of an absolutely formal nature. And upon such an objection the Court is not, in my opinion, bound to act, and usually refuses to act, even if the nature of the objection appears on the face of the by-law.

The power to quash, it is well established, is discretionary, both where the objection is, and where it is not, apparent: *Re Platt v. City of Toronto* (1872), 33 U.C.R. 53; *Re McKinnon v. Village of Caledonia* (1873), 33 U.C.R. 502; *Re Milloy and Township of Onondaga* (1884), 6 O.R. 573, 579. See also *Re Ferguson and Township of Howick* (1878), 44 U.C.R. 41, at p. 49, where Wilson, C.J., intimates that he would not have set aside the by-law, which was one imposing a tax for a drain, for having been passed without allowing the five days to appeal from the court of revision to the county Judge, if it had appeared that no one had in fact appealed, a situation not unlike that with which in this case we are called on to deal; and see *Re Huson and Township of South Norwich* (1892), 19 A.R. 343.

Where the omission is of something in the nature of a condition precedent, it is, of course, quite different, such as was the case in *Re Ostrom and Township of Sidney* (1888), 15 A.R. 372, and in *Re McRae and Village of Brussels* (1904), 8 O.L.R. 156.

For these reasons I am of the opinion that the appeal should be dismissed with costs.

MACLAREN, J.:—In my opinion this appeals fails on the simple ground that the by-law was duly passed by the town council within the six weeks fixed by sec. 373 as the time within which they should pass it.

The Chief Justice of the Exchequer Division held that they could not pass it within the first two of these six weeks, because within that time there might be a scrutiny by the county Judge.

Section 374 provides that in case there be a petition for such scrutiny, then the council shall not pass it until after the petition is disposed of. In this case, however, there was no such petition, so that sec. 374 does not apply.

I do not find anything in the statute preventing such a scrutiny being held after the by-law has been given its third reading, or

preventing the benefit and results of that scrutiny being taken advantage of, and I am not pressed by the argument *ab inconvenienti*. This might be used in the Legislature in advocating a change in the law, but I cannot see that it can properly be used here. Even if the learned Chief Justice were right in his opinion, I fail to see why, in any event, the council should be restrained during the second of the two weeks. Section 370 prescribes that at least one week's notice (that is, seven clear days) of the day appointed for the scrutiny shall be given to the clerk of the municipality. If during the first week the clerk has not received such notice, then what possible ground can there be for staying the action of the council, when a scrutiny cannot possibly be held, and the statute does not lay down such a restriction? In the present case it was admitted that no step had been taken towards a scrutiny, and the time within which the statutory steps could possibly have been taken had gone by before the by-law received its third reading.

To my mind the plain meaning of sec. 373 is that the council is given six weeks within which to pass the by-law, subject to be cut down only by the provision of sec. 338 requiring that it be not passed in less than a month after the first publication of the by-law. The Legislature named this time, no doubt, because it was aware that councils, as a rule, meet only at considerable intervals—frequently a month—and a time was allowed within which a regular meeting of the council would ordinarily be held, and there would be no necessity for calling a special meeting. If the view of the Chief Justice is correct, the statute allows only four weeks in any case, and naming six weeks is a delusion. I think that sec. 374 makes it clear that the council was to have the full six weeks, subject to be cut down only by sec. 338 above cited. If, for instance, a petition were presented one week after the passing of a by-law and the scrutiny lasted two weeks, then these two weeks are not to be reckoned as part of the six weeks which the council is to have, so that it would have six weeks after the scrutiny, or at least five weeks if the first week is counted, as I think it should be. But the Judge of first instance would only give the council four weeks, whether a petition were presented or not, a meaning I find it impossible to give to the statute.

The learned Chief Justice does not appear to have observed

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that if his construction of the Act be right, then the delay of a month mentioned in sec. 338 above referred to is not only unnecessary but misleading. The voting cannot take place until at least three weeks after the first publication of the by-law. Then follows the time for the summing-up by the clerk and the third reading, and after that the two weeks, during which it is claimed the council cannot pass the by-law. This would require more than five weeks in every case, and ordinarily at least six weeks. And yet sec. 338 requires that a notice be appended to the by-law that it will be finally passed after a month from the first publication, if it is approved by the electors.

It may almost be said to be common knowledge that municipal councils generally have acted upon the assumption that they might pass these by-laws during these two weeks if they had no notice of the intention to present a petition. From a somewhat extended experience in the examination of money and other by-laws coming under sec. 338, I am of opinion that probably as many of these are passed during the first two weeks as of any other two of the six. And although scores, if not hundreds, of such by-laws have been before the Courts subject to this defect (if defect it be), where they were keenly contested on almost every conceivable ground, this one appears to have escaped detection for over thirty years. If, however, the objection is a valid one, this would be no ground for declining to give effect to it. It only goes to suggest a doubt as to the soundness of an objection which the profession has ignored for so long a time.

I am, consequently, of the opinion that the statute, as it stands, does not prohibit the third reading within the two weeks, and that to so hold would be in reality to exercise a legislative and not a judicial function.

MEREDITH, J.A.:—For the like reasons which impelled me to oppose the grant of leave to appeal in this matter, this appeal should, in my firm opinion, be dismissed.

The single ground upon which it is now sought to quash the by-law is the purely technical one that it was passed within two weeks after the declaration of the poll. It is not even suggested that any sort of wrong was done, or any sort of incon-

venience even caused, to the petitioners, or to anyone else, by the act complained of. It is not suggested that he, or anyone else, desired a scrutiny, or that he, or any one else, was in any manner hampered or prejudiced by the act of the council which is said to have been premature; but the application was and is put upon the purely technical ground—not even supported by any expressed legislative requirement—that the two weeks ought to have elapsed before the by-law was finally passed.

On the other hand, the legislation required, in the clearest compulsory manner, that the by-law should be passed within six weeks after its approval by the electors—not after the expiration of the two weeks—and also provided that the duty imposed upon the council to so pass it might, at the instance of any elector, be enforced by mandamus or otherwise.

So that, if effect be given to this appeal, we shall have this extraordinary result, that, though the by-law be set aside to-day, upon this appeal, the council must, at the instance of any elector, even the appellant, be compelled, if necessary, by the Courts, to enact it again to-morrow, as if it had been enacted within the six weeks. Surely such a state of affairs would savour more of opera bouffe than of the common sense, not to mention the dignity, of the Courts of Justice.

This is not a proceeding in which the appellant, *ex debito justitiæ*, has a right to the judgment of the Court upon the question of the validity of the by-law. The summary method of procedure adopted in this matter is frequently, and perhaps even generally, a very convenient and proper way of dealing with such a question; but there are obvious exceptions, and this is one of them, for here we have an applicant, having no sort of special interest in the question of the validity of the by-law, but merely an interest in common with all the other electors of the municipality, seeking to set aside the by-law behind the backs of all persons who may have such special interest in it, and also behind the backs of all other persons having a general interest in it the same as himself, on a purely technical and essentially unsubstantial ground, and for no practical purpose, because, in case it is set aside, it must be enacted again under the mandate of the Legislature. A refusal to set it aside at his instance need not validate it, if invalid, against him or anyone else.

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OF
MIDLAND.
Meredith, J.A.

But, if the question of the validity of the by-law is to be considered, I desire to express my concurrence with the Judges of the Divisional Court in the conclusion reached by them. There is no expressed legislation against the passing of the by-law within the two weeks, and I can find no justification for reading the enactment as if it had been so expressed. If the reasons which impelled Mulock, C.J., to do so were founded in fact, there would be much to be said in support of his conclusion; but I cannot think that they are. I cannot but think that he fell into error in supposing that the passing of the by-law would prevent a scrutiny. To reach that conclusion it is again necessary to read into the enactment words which it does not contain, and for which there is no need.

I entirely agree with the learned Judges of the Divisional Court that the validity or invalidity of the by-law depends upon whether, in fact, it was, or was not, approved by three-fifths of the electors who voted upon it, not upon the time when the council happened to comply with the legislative mandate—to pass it within six weeks after such approval. If it were so approved it ought to stand; if it were not the passing of it merely would not give it validity.

Moss, C.J.O., agreed in the result.

G. F. H.

[BOYD, C.]

RE HUDSON.

1908

April 3.

Will—Construction—Gift of Whole Estate—Incomplete Enumeration—"Appurtenances"—Farm Stock and Implements—"Household Goods"—Money—Intestacy.

A testator by his will, after directing payment of debts, etc., proceeded: "I give, devise, and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say: I give, devise, and bequeath to my son W. my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed;" and appointed an executor:—

Held, that all the testator's estate, including money, farm stock, and farm implements, passed by the will to the son named.

MOTION by Catherine A. Jacklin, a daughter and one of the heirs-at-law and next of kin of Charles Hudson, late of the township of Grey, farmer, who died on the 23rd February, 1907, for an order, under Rule 938, determining the question whether the whole estate of the testator passed under the will or whether there was an intestacy as to all the personalty except the household goods.

Probate of the will was granted to William Edward Hudson as executor on the 28th March, 1907.

The material parts of the will were as follows:—

"I direct all my just debts, funeral and testamentary expenses, to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

"I give, devise, and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say:

"I give, devise, and bequeath to my son William Charles Hudson my farm, being lot number 29 in the 5th concession of the township of Grey . . . which is my present residence, and all appurtenances connected therewith with all my household goods of which I may die possessed.

"My son William Charles Hudson is to provide a home for my granddaughter Ollie Hudson until she is 21 years of age, on condition that she makes her home permanently with my son William Charles Hudson.

"And I nominate and appoint my brother William Edward

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Hudson . . . to be co-educator (*sic*) of this my last will and testament, hereby revoking all former wills by me made."

It was stated in the affidavit of the applicant that the testator left personal estate other than household goods of about the value of \$1,000.

The motion was heard by BOYD, C., in the Weekly Court, on the 2nd April, 1908.

W. E. Middleton, K.C., for the applicant.

W. M. Sinclair, for William Charles Hudson.

A. B. Macdonald, for the other children of the testator.

No one appeared for the executor.

April 3. BOYD, C.:—The will is short, and is framed by one not a lawyer who uses large words not very aptly, but the intention of the whole is apparent with reasonable certainty.

The first clause is: "I give, devise and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say." That clause by itself carries all the estate of the testator at his death, but does not say to whom. The clause "that is to say," in the phrase of the old reporter and Chief Justice, Hobart, is "a kind of handmaid or interpreter to particularize that that is before general, but it must neither increase nor diminish, for it is not the nature of it to give of itself:" *Stukeley v. Butler* (1615), Hob. R. 168, 171, 172.

Then the testator enumerates thus: "I give . . . to my son William . . . my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods." Herein no explicit reference is made to "money, farm stock, and farm implements," and it is said there is an intestacy as to these.

The modern rule of construction, as expressed by Lord Westbury, is that the entirety which has been expressly and definitely given shall not be prejudiced by an imperfect and inaccurate enumeration of the particulars: *West v. Lawday* (1865), 11 H.L.C. 375, 384. And by the application of this rule the modern doctrine is settled, that when a testator gives his property generally by the words "all my property," etc., when he uses words sufficient to pass everything, and then proceeds to enumerate particulars—

this enumeration does not abridge or cut down the effect of the general words. This conclusion, as thus expressed by Malins, V.-C., in *King v. George* (1876), 4 Ch.D. 435, 439, was adopted and approved by the Court of Appeal in *S. C.* (1877), 5 Ch.D. 627, 629.

Besides this aspect of the will, I think it may be inferred from its contents that the intention of the testator was to benefit his son, who is sole beneficiary, by the farm stock and farm implements. These things the draftsman understood were comprehended in the word "appurtenances." This, no doubt, is a word of large and flexible meaning, and, apart from its legal conveyancing sense, it has a popular meaning, and may be applied to personalty. One of its meanings in the Oxford Dictionary is, "things which naturally and fitly form a subordinate part of and belong to a whole system—contributory adjuncts." Thus, as applied to a whaling ship, it will comprise harpoons and all the outfit of fishing stores: *The "Dundee"* (1823), 1 Hagg. Adm. R. 109, 126. As applied to a silver kettle and lamp, it will carry the stand or frame that supports the kettle: *Hunt v. Berkley* (1728), Mosely (Ca. 32) p. 47.

I would doubt the sufficiency of the words "my farm and residence with all appurtenances connected therewith" *per se* to pass the farm stock and implements, but, having regard to the context and the whole will, I think they may be eked out by the general words carrying all his estate, real and personal: see *Gulliver d. Jeffereys v. Poyntz* (1770), 3 Wils. 141; *Doe d. Lempriere v. Martin* (1777), 2 W. Bl. 1148; *Doe d. Clements v. Collins* (1788), 2 T.R. 498; see also *Swinfen v. Swinfen* (1860), 29 Beav. 207, which also decides that money in the house will pass under bequest of "household goods," and on the same point *Mahony v. Donovan* (1863), 14 Ir. Ch. 262.

Costs out of estate.

E. B. B.

Boyd, C.

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RE

Hudson.

[IN CHAMBERS.]

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RE REITH ET AL. V. REITH ET AL.

April 1. *Surrogate Courts—Removal of Cause into High Court—Will—Undue Influence—Value of Estate—Importance of Issues.*

Upon an application under sec. 34 of the Surrogate Courts Act to remove a cause from a surrogate court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits: it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. Much is left to the discretion of the High Court Judge as to the disposal of each application.

And where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over \$27,000, which had shrunk at her death in 1907 to \$5,850, and the allegation was that she had not been able to protect herself against the undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime—an order was made for the removal of the cause into the High Court.

MOTION by the defendant J. G. Reith for an order transferring the action from the surrogate court of the county of Dufferin into the High Court.

The motion was heard by BOYD, C., in Chambers, on the 31st March, 1908.

A. McLean Macdonell, K.C., for the applicant.

A. A. Hughson, for the plaintiffs.

F. W. Harcourt, K.C., for the infants.

Grayson Smith, for the other defendants.

April 1. BOYD, C.:—The High Court has special jurisdiction by statute to try the validity of wills and to pronounce them to be void for fraud and undue influence and otherwise: R.S.O. 1897, ch. 51, sec. 38. No doubt, the surrogate courts have, when the will is to be proved in solemn form, concurrent jurisdiction, but in contentious matters as to the grant of probate, or in which disputed questions of law or fact may be raised, the cause shall be removable by any party into the High Court by order of a Judge, to be obtained after notice and on summary application supported by affidavit: R.S.O. 1897, ch. 59, sec. 34; subject to this proviso, that no such removal shall be had unless the cause is of such a nature and of such importance as to render it proper to withdraw it for the disposal of the High Court, and that the property exceeds \$2,000 in value: sec. 34 (2).

The importance of the case and its nature are not to be tried on counter-affidavits: it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. No doubt, much is left to the discretion of the High Court Judge as to the disposal of each application. In *Re Wilcox v. Stetter* (1906), 7 O.W.R. 65, my brother Mabee was influenced by the comparatively small value of the estate—just at the statutory limit; and that was also the guiding element in the case before my brother Riddell of *Re Graham v. Graham* (1908), 11 O.W.R. 700.

The pleadings here disclose what is to be at issue upon the facts and the law—chiefly that the testatrix, a widow, was unable to protect herself against undue influence of the chief beneficiaries, her two sons—she being illiterate and not versed in business. It appears that her husband died in 1905, leaving her an estate valued at over \$27,000, and that her whole estate left at her death in 1907 was \$5,850. One of the sons, the executor, is said to have acquired a large part of the father's estate by an arrangement, in which he claimed as partner, that is sought to be brought into question. Considerable payments, \$13,000 in all, are said to have been made (over one-half to the two sons) about twelve days before the death. These are some of the salient matters that appear to be involved, and they are of such character and importance as to justify, in my opinion, an order for transfer to be made.

Costs will be disposed of by the Judge at the trial.

Boyd, C.

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REITH.

E. B. B.

[IN CHAMBERS.]

1908

ROBERTSON V. ROBERTSON.

March 23.
March 31.

Foreign Judgment—Alimony—Arrears—Writ of Summons—Special Indorsement—Summary Judgment—Rules 138, 603.

An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special indorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603.

Swaizie v. Swaizie (1899), 31 O.R. 324, applied and followed.
Decision of the Master in Chambers affirmed.

MOTION by the plaintiff for summary judgment under Rule 603 in an action upon a foreign judgment for alimony.

The motion was heard by Mr. JAMES S. CARTWRIGHT, K.C., the Master in Chambers, on the 20th March, 1908.

A. R. Clute, for the plaintiff.

A. R. Hassard, for the defendant.

MARCH 23. THE MASTER IN CHAMBERS:—On the 25th September, 1905, the plaintiff obtained judgment in one of the Courts of the State of Ohio, which gave her (with other relief) alimony at \$6 a week, commencing apparently on the 30th December, 1905, and payable "so long as they may live."

The plaintiff commenced an action on this judgment on the 3rd March instant, claiming arrears of alimony from the 23rd June, 1906, until the 29th February, 1908, being for 88 weeks, at \$6 a week, amounting to \$528. There is also a claim for a judgment for future alimony. The defendant has appeared, and the plaintiff has moved for judgment under Rule 603.

The plaintiff makes the necessary affidavit, and produces a properly certified copy of the foreign judgment.

No affidavit is filed in answer to the motion.

Both parties apparently now reside in Toronto.

The case relied on by Mr. Clute, *Swaizie v. Swaizie* (1899), 31 O.R. 324, is an authority in favour of the motion, so far as the arrears are concerned. But it is not so clear that Rule 603 can be applied on the other branch, and the jurisdiction must be clear and unqualified before a judgment can be obtained except on application to a Judge of the High Court.

The plaintiff may have judgment, therefore, for \$528 (see form No. 4 of part II. of indorsements, "Foreign Judgment," in the appendix to the Consolidated Rules), and will proceed for the rest of the claim as she may be advised.

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The defendant appealed from the decision of the Master in Chambers, and the appeal was heard by BOYD, C., in Chambers, on the 31st March, 1908.

I. F. Hellmuth, K.C., and *A. R. Hassard*, for the defendant.

A. R. Clute, for the plaintiff.

March 31. BOYD, C.:—Having considered the effect of the decisions in this country, I do not think I should disturb the Master's judgment. The foreign judgment as to the arrears of alimony is explicit that they are to be paid at a given date and enforceable upon default by process of execution. The cases seem to regard that (apart from the peculiarities of the English law of divorce and alimony as incident thereto) as a final adjudication as to the past, which, by the effect of the judgment, becomes a debt enforceable by ordinary process as a legal debt. If such a foreign judgment is enforceable by action, then it may be specially indorsed under our Rules as a "debt arising upon a contract, express or implied:" Rule 138 and *Re Kerr v. Smith* (1894), 24 O.R. 473. Arrears of alimony are held to be a debt, though not a debt at law, in *Lin on v. Lin on* (1885), 15 Q.B.D. 239, 246. That, no doubt, is the view underlying the English decisions in *Bailey v. Bailey* (1884), 13 Q.B.D. 855, 859, and *Robins v. Robins*, [1907] 2 K.B. 13; but reasons are given by Meredith, J., in *Aldrich v. Aldrich* (1893), 24 O.R. 124, 131, for distinguishing judgments for the payment of alimony under our system. That arrears of alimony under a judgment therefor are to be regarded as a finality is evidently the view of Ferguson, J., in the same case as reported in (1893), 23 O.R. 374, 378. The Ontario law and decisions have been elaborately discussed in British Columbia, and by the judgment of the full Court it was held that an action can be maintained for arrears of alimony past due upon a foreign judgment: *Hadden v. Hadden* (1899), 6 B.C.R. 340. The like view appears to be involved in the decision which the Master thought binding

- Boyd, C. upon him, as it is upon me, of a Divisional Court in *Swaizie v.*
1908 *Swaizie*, 31 O.R. 324, 327.
- ROBERTSON The judgment is, therefore, affirmed with costs.
v. No affidavit is put in by the defendant, and he has no defence
ROBERTSON. except the legal one.

E. B. B.

[IN CHAMBERS.]

McFARLANE v. HENDERSON.

1908Jan. 21.*Will—Personal Property—Restraint on Alienation—Invalidity.*

A testator directed that his estate should be invested and the income paid to his two sons equally until they reached the age of thirty-five, when they were to receive the principal, and he further declared that "none of my children shall have power to anticipate or alienate, either voluntarily or otherwise, any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared."

Notwithstanding the above, one of the sons assigned his interest under the will to various creditors:—

Held, that the assignments were valid, and the restriction on alienation which the testator had sought to impose invalid.

The reasons for the rule of equity which enables a restraint against alienation and anticipation to be imposed on the separate estate of a married woman does not apply to such a case.

THIS was a motion by the plaintiff for an order to continue the appointment of a receiver under the circumstances set out in the judgment. The motion was argued before MEREDITH, C.J.C.P., in Chambers, on December 16th, 1907.

W. J. Elliott, for the plaintiff, contended that the assignments were invalid as being in contravention of the will; that the restriction on alienation was not general, but restricted as to time, and therefore good: *In re Macleay* (1875), L.R. 20 Eq. 186; *In re Weller* (1888), 16 O.R. 318; *In re Northcote* (1889), 18 O.R. 107; that the same rules of law as regards restrictions on alienation are applicable to a bequest of personalty as to a sale or devise of realty: *Woodmeston v. Walker* (1831), 2 Russ. and M. 197; *In re Dugdale*, *Dugdale v. Dugdale* (1888), 38 Ch. D. 176; *Metcalfe v. Metcalfe* (1889), 43 Ch. D. 633, [1891] 3 Ch. 1; *Corbett v. Corbett*

(1888), 14 P.D. 7, at p. 12; and that the attaching order granted was valid: *Hunsberry v. Kratz* (1903), 5 O.L.R. 635; *Stuart v. Grough* (1887), 15 A.R. 299. He also referred to *Blackburn v. McCallum* (1902), 33 S.C.R. 65; *Re Porter* (1907), 13 O.L.R. 399; *Re Martin and Dagneau* (1906), 11 O.L.R. 349.

Grayson Smith, for the Toronto General Trusts Corporation, submitted their rights to the Court.

C. A. Moss, for Long, contended that the assignments were good, as the rules against anticipation do not apply in the case of a bequest of personalty unless there is a bequest over, and in this case there was none.

January 21. MEREDITH, C.J.:—This is a motion by the plaintiff for an order to continue “the appointment of the Union Trust Co., Limited, as receiver without security to collect, get in and receive the moneys, property and effects coming to the defendant (Charles A. Henderson), from or in respect of the late John B. Henderson’s estate, to which, under the will of the said John B. Henderson, the defendant is entitled, to the extent of the plaintiff’s judgment and costs,” an order appointing the Union Trust Co., Limited, as receiver until October 29th, 1907, or until any motion which might be made by the plaintiff on or before that date to continue the appointment should be disposed of, having been made by my brother Britton on October 17th, 1907.

By the 14th paragraph of the will of John B. Henderson he provided as follows:

“14. I direct my said executors to invest the balance of my estate and to keep the same invested from time to time, paying the income derived therefrom to my two sons, Charles A. Henderson” (the defendant) “and John B. Henderson, equally, share and share alike, until they respectively reach the age of thirty-five years, and to pay their respective shares of the principal then remaining to my said two sons as they respectively attain the age of thirty-five years, and I give such residue of my estate to my said two sons, Charles A. Henderson and John B. Henderson, in equal shares accordingly.”

By the 15th paragraph of his will the testator further provided:

“15. I especially direct and declare that none of my children

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Meredith, C.J. shall have power to anticipate or alienate, either voluntarily or otherwise, any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared. And I declare that no document or instrument purporting to alienate or anticipate such payments and no process of law assuming to do so shall have any force or effect, but that, on the contrary, the payments herein directed to be made to my said children shall be made to them personally at the times herein provided for."

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Paragraph 20 of the will is as follows:

"20. In the event of the death of either of my said sons, either in my lifetime or before he attains the age of thirty-five years, leaving lawful issue him surviving, such issue shall represent the deceased parent and take the parent's share, but in the event of the death of either of my said sons, either in my lifetime or before he attains the age of thirty-five years, without leaving lawful issue him surviving, the share of my estate which he would have taken had he lived to attain thirty-five years of age, shall thereupon descend to and devolve upon my surviving children and the lawful issue of such of them as may have died before that time, leaving lawful issue, *per stirpes* and not *per capita*."

By an earlier provision of the will (paragraph 13), the testator bequeathed, at the death of his wife, \$50,000 in equal shares to his daughters, Lillian Crombie and Margaret Henderson, with a provision that if his wife died before his daughter Margaret attained twenty-five, that daughter should be entitled to the income only of her share until she should attain that age; and by a still earlier provision (paragraph 5) he bequeathed to his daughter Margaret the income of \$25,000 until she attained twenty-five, and the principal to her when she attained that age.

The defendant assigned his interest under the will to William D. Long as security for payment of his then and any future indebtedness to Long, and the amount now due to Long is said to be \$26,463.93.

The defendant subsequently assigned his interest under the will to the Sovereign Bank of Canada as collateral security for a loan of \$121,500.

After these assignments Holt Renfrew Company obtained an attaching order from the 10th Division Court of the county of

York, attaching all debts due from the executors to Charles A. Henderson, to satisfy a judgment obtained by the attaching creditors against Henderson in that court on November 2nd, 1906.

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The receiving order made by my brother Britton is expressed to be made without prejudice to the rights of any prior incumbrancers.

The applicant contends that the effect of paragraph 15 of the will is to render invalid the assignments made by the defendant to Long and to the Sovereign Bank of Canada, and that the attaching order of Holt Renfrew Company is ineffectual, because the interest of the defendant under his father's will is not an attachable or garnishable debt.

I am of opinion that the contention of the plaintiff as to the invalidity of the assignments is not well founded.

The restriction sought to be imposed by the testator, if valid, would deprive the beneficiaries of the power of anticipating the payments of the income to which they are entitled and all power of alienation of both the income and the corpus until the times fixed by the testator as the periods when they are to receive them.

If, as counsel for the plaintiff contended, and was said by the Lord Chancellor (Brougham), in *Woodmeston v. Walker*, 2 Russ. & M. 197, cited by Mr. Elliott, "the rule of law which prevents a party from imposing fetters upon property . . . is precisely the same, I apprehend, in personal as in real estate" (p. 204), *Blackburn v. McCallum*, 33 S.C.R. 65, is conclusive against the validity of the restriction which the testator has sought to impose upon the powers of alienation of that which he bequeathed to the defendant.

The Supreme Court of Canada, in that case, determined that a restraint upon alienation general in character, though limited as to time, as is the restraint in this case, is invalid.

Neither *Re Porter*, 13 O.L.R. 399, cited by Mr. Elliott, nor *Re Martin & Dagneau*, 11 O.L.R. 349, help the plaintiff, and both of them are distinguishable from *Blackburn v. McCallum* on a ground which is not applicable to this case, viz., that the restriction upon alienation was not general, but limited to certain modes of alienation.

In *Woodmeston v. Walker* the Lord Chancellor, after the

Meredith, C.J. passage from his judgment which I have quoted, went on to say:
1908 "Thus, where the subject is a personal chattel, it is impossible
McFARLANE so to tie up the use and enjoyment of it as to create in the donee
v. a life estate which he may not alien; although the object may
HENDERSON. be attained indirectly in a manner consistent with the known rules
of law, by annexing to the gift a forfeiture or defeasance on the
happening of a particular event, or on a particular act being done,
for in that case the donee takes by the limitation a certain estate,
of which the event or act is the measure; and upon the happening
of the event, or the doing of the act, a new and distinct estate
accrues to a different individual. If a testator be desirous to
give an annuity without the power of anticipation, he can only
do so by declaring that the act of alienation shall determine the
interest of the legatee, and create a new interest in another. In
none of the cases bearing upon this subject (and they are very
numerous) can any warrant be found for the proposition that
at law an inalienable estate can be created without any gift over.
There is no gift over in the present case, which is that of a mere
naked prohibition, not guarded by any clause of forfeiture":
p. 204.

The reasons for the rule of equity which enables a restraint to be imposed on the separate estate of a married woman by prohibiting her from aliening it or depriving her of the power of anticipation are, further on, pointed out by the Lord Chancellor as resting upon the basis that the separate estate being "an invention of equity, it followed that the same Court which invented, might mould and modify its own creation in whatever manner it thought fit": pp. 205-6.

Having come to the conclusion that the restriction sought to be imposed by the testator is invalid, it would seem that no good purpose would be served by continuing the receivership subject to the rights of Long and the Sovereign Bank, as their claims, in the aggregate, as I understand it, exceed the value of the interest of the defendant in his father's estate present and prospective, and I will, therefore, refuse the motion with costs, unless the plaintiff desires to be further heard as to this aspect of the case. If he desires this, he must intimate his desire to the registrar within a week, and if he does so the case may be spoken to again on the point mentioned.

A. H. F. L.

[MEREDITH, C.J.C.P.]

NATIONAL TRUST CO. v. SHORE.

1908

Jan. 21.

Settled Estates Act—Life Tenant—Lease by—Registration of Lease—Death of Life Tenant before Registration—Invalid Lease—R.S.O. 1897, ch. 71, secs. 32, 42, 43—R.S.O. 1897, ch. 330, sec. 24.

A testator devised lands upon trust "to allow my wife so long as she remains my widow and no longer the use and occupation and the rents, issues, and profits for her own use absolutely." And he directed that upon re-marriage or death of his wife the land should be sold and the proceeds divided among his children. He died in 1897, and in January, 1906, his widow leased the land for five years with right of renewal, and died in April, 1906. The lease was registered in December, 1906. The executors of the testator received the rent monthly after the death of the widow till February, 1907, when they sold the land:—

Held, that the land was a settled estate within the meaning of the Settled Estates Act, R.S.O. 1897, ch. 71, and the estate during widowhood was an estate for life within sec. 42 of that Act, and that the lease when registered took effect, notwithstanding the payment of rent in the meantime to the executors, the rights of a *bona fide* purchaser for value without notice not having intervened.

Held, also, that if this were not so the lease at any rate must be considered in equity as a contract for a valid lease, by virtue of R.S.O. 1897, ch. 330, sec. 24.

THIS action, which was for recovery of possession of land, was tried before MEREDITH, C.J.C.P., sitting without a jury at Stratford, on November 5th, 1907.

The circumstances of the case are fully set out in the judgment.

G. G. Macpherson, K.C., for the plaintiffs contended that Margaret Gibson did not take a life estate, but only an estate during widowhood, and that the estate was not a "settled estate" within the meaning of the Settled Estates Act, R.S.O. 1897, ch. 71; that the lease by Margaret Gibson did not take effect until registered, and that a new monthly tenancy had been created by the executors. He referred to Woodfall on Landlord and Tenant, 14th ed., p. 9; *In re Tredwell, Jeffray v. Tredwell*, [1891] 2 Ch. 640; *In re Mumby* (1904), 8 O.L.R. 283; and the Settled Estates Act, R.S.O. 1897, ch. 71, secs. 2, 32, 42.

F. H. Thompson, for the defendant, referred to Woodfall on Landlord and Tenant, 16th ed., pp. 151, 154, 155; Co. Litt. 42a; *Wright v. Plowden* (1757), 1 Burr. 282; *Armour's Real Property*, 1st ed., 1901, p. 107; *Encycl. of Laws of England*, vol. 2, p. 487; *Whitlock's Case* (1609), 8 Rep. 69 b; R.S.O. 1897, ch. 330, secs. 24, 25.

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January 21. MEREDITH, C.J.:—Action tried before me sitting without a jury at Stratford, on the 5th day of November, 1907.

The plaintiffs, claiming to be the owners of the land in question, sue to recover possession of it, alleging that the defendant occupied as a monthly tenant under them, and that his tenancy has been determined.

The defendant sets up that he is tenant for a term of five years and nine months from February 1st, 1906, under a lease to him from Margaret Gibson, that he entered into possession under the lease immediately upon its execution, and has ever since remained in possession.

The defendant also alleges that his lessor was entitled to the possession and to the receipt of the rents and profits of the land for an estate for life of the land, and that the lease was made pursuant to the provisions of and the powers conferred by the Settled Estates Act, R.S.O. 1897, ch. 71, and was registered in the proper registry office as required by the Act; and he claims to be entitled to hold the land under his lease during the remainder of the term, notwithstanding that the lessor has since died.

Both parties claim under the will of Henry Gibson, who was owner of the land at the time of his death, which occurred on December 1st, 1897.

By his will, which bears date June 22nd, 1896, Henry Gibson devised all his real estate, except parts of it specifically devised, which do not include the land in question, to his executors and executrix on (among other trusts) the following:—

“(g) To allow my wife so long as she remains my widow and no longer the use and occupation and the rents, issues and profits of the remainder of my real estate for her own use absolutely.”

And he directed that upon his wife again intermarrying, or upon her death, whichever should first happen, the real estate devised to her during her widowhood should be sold, and the proceeds of the sale be divided among his children then surviving in equal shares, with a provision that the issue of any child which should have died before the period of distribution should take the share which the deceased child if living would have taken.

The lease to the defendant bears date January 26th, 1906, and contains a covenant on the part of the lessor for a renewal for a

further term of five years from the expiration of the term granted, but no reference is made in it to the Settled Estates Act.

The lessor Margaret Gibson died on April 21st, 1906, and the surviving executors, under the powers conferred upon them by the will, sold, and on February 5th, 1907, conveyed, with other lands, the land in question to Robert Spelman Robertson; and Robertson, on March 1st, 1907, conveyed the same lands to the Canadian Bank of Commerce; and the bank on the same day conveyed them to the plaintiffs; and the conveyances were registered on March 11th, 1907, except that to the plaintiffs, which was registered on the 23rd of that month.

The defendant's lease was registered on December 1st, 1906, and after the death of Margaret Gibson the defendant continued to occupy the land.

No confirmation of the lease was executed by the executors, but they received from the defendant the monthly rent reserved by the lease after the death of Margaret Gibson until the land was sold by them.

Robertson, the Canadian Bank of Commerce, and the plaintiffs, when they respectively acquired the land, did so with actual knowledge of the lease to the defendant and of his possession under it.

The land was erroneously described in the lease as being part of lot H in the Canada Company's survey, though it in fact forms part also of lot I. This error is unimportant, as the lease contains a description sufficient to pass the land intended to be leased, which is described as "being now occupied by the lessee as a boot and shoe store, together with the cellar underneath the said store," and the erroneous description may therefore be rejected as *falsa demonstratio*.

The validity of the lease as one having effect under the provisions of secs. 42 and 43 of the Settled Estates Act, R.S.O. 1897, ch. 71, is attacked by the plaintiffs on three grounds:—

(1) That the land was not a settled estate within the meaning of the Act;

(2) That Margaret Gibson was not a person who under the provisions of sec. 42 was entitled to exercise the powers conferred by that section; in other words, that she was not "a person entitled to the possession or to the receipt of the rents and profits" of the demised premises for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate;

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(3) That the lease did not take effect until December 1st, 1906, the date of its registration, and that the payment of the monthly rent to the executors created a new monthly tenancy between them and the defendant, and that the existence of this new tenancy prevented the lease from ever becoming operative so as to be binding on the persons entitled to estates subsequent to the estate of the lessor under the will.

Settled estates are defined—sec. 2 (2)—to be “hereditaments of any tenure, and all estates or interests in any such hereditaments, which are the subject of a settlement”; and a settlement is defined—sec. 2 (1)—to be “any Act of Parliament, deed, agreement, will or other instrument, or any number of such instruments, under or by virtue of which any hereditaments of any tenure or any estates or interests in any such hereditaments stand limited to or in trust for any persons by way of succession, including any such instruments affecting the estates of any one or more of such persons exclusively.”

That the land is a settled estate within the meaning of the Act appears to be clear: *In re Morgan's Settled Estate* (1870), L.R. 9 Eq. 587; *Carlyon v. Truscott* (1875), L.R. 20 Eq. 348; *In re Cornell* (1905), 9 O.L.R. 128.

That the lessor of the defendant was such a person as is entitled under the provisions of sec. 42 to exercise the power of leasing conferred by that section is not open to serious question, for an estate during widowhood is an estate for life, and as perfect an estate for life until the event upon which it is to terminate takes place as if it had been granted absolutely: Co. Litt. 42a; Woodfall's Landlord and Tenant, 16th ed., pp. 154-5; Armour on Real Property, pp. 106-7; *Re Carne's Settled Estates*, [1898] 1 Ch. 324.

Section 32, relied on by the plaintiffs, which provides that leases “executed in pursuance of the exercise of any of the powers conferred by” the Act “shall not take effect until registered in the proper registry or land titles office where the lands are situate,” and that the lease or duplicate to be registered shall be executed by the lessee as well as the lessor, does not, I think, help the plaintiffs.

The purpose of the enactment is made more clear on reference to sec. 33 of the English Act (40-41 Vict. ch. 18), which shews that the requirements of that section were intended to guard against fraud or mistake.

The lease to the defendant was registered after the death of the widow, but before the land was sold by the executors, and in my opinion when registered it took effect, notwithstanding the payment of rent in the meantime by the defendant to the executors. I see no reason, and none was suggested in argument, why the delay in registration and the payment of rent to the executors, the rights of a *bonâ fide* purchaser for value without notice not having intervened, should have the effect of destroying the lease so far as it affected the interests of the persons entitled in remainder. If the contention of the plaintiffs' counsel were well founded, had the widow died on the day following the execution of the lease and before it was registered, it would seem to follow that the lease could never have taken effect under the Act. The provision as to registration is somewhat analogous to that of the statute of 27 Hen. VIII. ch. 16, as to the enrolment of deeds of bargain and sale, and the purpose of the two enactments was similar.

In *Vaughan ex dem. Atkins v. Atkins* (1771), 5 Burr. 2764, delivering the judgment of the Court, Lord Mansfield said, at p. 2787: "There is no rule better grounded in law, reason and convenience than this, 'that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act; and operate from the substantial part, by relation.' Livery relates to seisin, inrollment to the bargain and sale, a recovery to the deed which leads the use; so admittance shall relate to the surrender, especially when it is a sale for valuable consideration, as in this case."

The rule quoted by Lord Mansfield was applied in this Province in an early case: *Doe ex dem. Spafford v. Brown* (1833), 3 O.S. 90.

The language of sec. 32 differs in some respects from that of the statute of Henry VIII. The latter enacts that "no lands, manors, tenements or other hereditaments shall pass, alter or change from one to another, whereby any estate of inheritance or freehold shall be made or take effect in any person or persons, or any use thereof to be made, by reason only of any bargain and sale thereof, except the same bargain and sale be made by writing indented, sealed and enrolled" in the manner prescribed by the Act within six months next after its date; while the provision of sec. 32 of R.S.O. 1897, ch. 71, is that the lease shall not take effect until registered. The meaning of this cannot, I think, be that no effect whatever is to be

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given to the lease until it is registered, but that effect under the Act does not attach to it until it is registered, and there is no reason why when the registration takes place the lease should not operate from its execution,—the substantial part,—by relation. However, if this be not so, as I have said, I see no reason why in the circumstances of this case the lease did not when registered take effect under the Act and become valid against all other persons entitled to estates subsequent to the estate of the widow under the settlement: sec. 43.

If, however, I am wrong in my view as to the third objection, the provisions of sec. 24 of R.S.O. 1897, ch. 330, afford a complete answer to the objection.

The section is as follows:—

“24. Where in the intended exercise of any power of leasing, whether derived under a statute, or under any instrument . . . a lease has been, or shall hereafter be granted, which is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled, after the determination of the interest of the person granting such lease, to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made *bonâ fide*, and the lessee named therein, his heirs . . . have entered thereunder, shall be considered in equity as a contract for a grant at the request of the lessee, his heirs . . . of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract.

“Provided”

If the lease in question is invalid as a lease having effect under the provisions of secs. 42 and 43 for the reasons urged in the objection, the section quoted, in my opinion, applies, and makes the lease a good contract for a valid lease under the power conferred by sec. 42 of the Settled Estates Act, binding upon the plaintiffs in equity, and possession under it is a sufficient answer to the action:

Farwell on Powers, 2nd ed., p. 345; 1 Key & Elphinstone Precedents, 5th ed., p. 847.

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I must not be understood as assenting to the argument of the learned counsel for the plaintiffs that the payment of the rent to and the acceptance of it by the executors after the death of the widow had the effect of a new demise of the premises by the executors from month to month. It was certainly not so intended by the defendant, and I would find upon the evidence that such a new tenancy was not created. If any new tenancy was created it was a tenancy from year to year, and not a monthly tenancy, but I think that none of that or any other nature was created.

In my opinion the action fails and must be dismissed with costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

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THE KEEWATIN POWER COMPANY V. THE TOWN OF KENORA.

THE HUDSON'S BAY COMPANY V. THE TOWN OF KENORA.

Rivers and Streams—Water and Watercourses—Non-tidal Rivers—Grant of Lands Bordering on—Title to Bed of River ad Medium Filum Aquæ—Common Law Doctrine—R.S.O. 1897, ch. 111, sec. 1.

The common law of England relative to property and civil rights—as introduced into this Province in 1792, now enacted in the R.S.O. 1897, ch. 111, sec. 1—except in so far as repealed by Imperial legislation having force in this Province, or by provincial enactments, is the rule for the decision of the same. Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas if non-tidal, whether navigable or not, the title in the bed *ad medium filum aquæ* is presumed *primâ facie* to be in the riparian proprietor.

Where, therefore, lands were granted by the Crown bounded by the Winnipeg River, a non-tidal river, the title to the bed of the river *ad medium filum aquæ* was held to have passed to the riparian owners by virtue of the grant to them, there being nothing in the grants, particulars of which are set out in the case, to rebut the presumption.

Judgment of ANGLIN, J., at the trial, varied.

THESE were appeals from the judgments of Anglin, J., reported 13 O.L.R. 237.

On September 23rd, 1907, the appeals were heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

The appeals were argued together.

Wallace Nesbitt, K.C., and John Jennings, for the Keewatin Company.

L. G. McCarthy, K.C., and C. A. Moss, for the Hudson's Bay Company.

The first question to be considered is as to whether the river was or was not a navigable river; and this depends on its condition in its natural unimproved state. The Winnipeg River was not, as a whole, in its natural state, a navigable river. The portion in dispute here, namely, the eastern outlet of the Lake of the Woods, is a distinct and separate outlet of insignificant character, and non-navigable. The navigable portion of the river commences some fifteen miles below; if a public water highway existed from the Lake of the Woods, the eastern outlet never formed part of it. The respondents treated it themselves as non-navigable by omitting to comply with the requirements of the R.S.C. 1886, ch. 92, sec. 2, now R.S.C. 1906, ch. 115, sec.

4, which otherwise would have rendered necessary the consent of the Governor-General-in-Council when they built the dam. They also admitted its non-navigability by accepting the lease from the Province of Ontario without the required provision as to the bed of the river, 61 Vict. ch. 8 (O.) Whether it was navigable or not is really immaterial, for there is no question but that it was a non-tidal river. The bed of the river therefore passed to the appellants as riparian proprietors by virtue of the grant to them. This clearly would be so at common law; and by the Act of 1772, 14 Geo. III. ch. 1, now contained in R.S.O. 1897, ch. 111, sec. 1, the common law was introduced into this country to its full extent. At common law the rules applicable to rivers are: (1) In navigable tidal rivers, the right to the bed of the river, *ad medium filum aquæ*, remains in the Crown; (2) in non-navigable tidal rivers the right is presumed to be in the riparian proprietor; and (3) in navigable rivers above the tide, the right is also presumed to be in such proprietor. In the case of the Great Lakes and international waters a contrary presumption might be invoked, as there are dicta of learned Judges which would give force to such presumption; but there has been no actual decision on the point. There is no inconvenience or inconsistency in holding that a river is a public highway, and at the same time its bed is in the riparian proprietor, subject to the public easement of navigation. It cannot be assumed that the Crown, as represented by the Province, intended to reserve the river bed for the protection of public right of navigation. The Province has no jurisdiction or control over navigation, and would therefore have no power to make a lease reserving such right. The right to the flow and usufruct, both ordinary and extraordinary, of the waters of a stream, are appurtenant to the ownership of the bank, and not to the ownership of the bed of the stream. The Crown, having granted the fee in the lands on both banks, could not afterwards derogate from their grant by granting the fee in the bed of the river, *ad medium filum aquæ*, to others.

N. W. Rowell, K.C., and George Wilkie, for the respondents. The evidence abundantly establishes the fact that the eastern branch of the Winnipeg River, as found by the trial Judge, formed part of a navigable river. It was for years known and used as one of the links of water communication for commerce, and transporta-

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tion of merchandise, and was of great value as a highway. The fact that navigation is interrupted by falls or rapids does not render a river non-navigable either in law or in fact. When once it is shewn that there is a sufficient body of water above and below the spot where the natural impediment exists, though it may render the stream at that spot practically unnavigable, it does not cease to be part of the stream in its natural sense. The question whether or not land bounded by a navigable river is to be extended *ad medium filum aquæ*, is a question of construction depending upon the intention of the parties to the instrument, to be collected from the language used with reference to the surrounding circumstances. Here the intention was that the bed of the river should not pass. In England the circumstances were such as might justify the Courts in holding that in the case of non-tidal waters the bed of such waters, *ad medium filum aquæ*, passed with the grant of the riparian lands. It is not necessarily a rule of the common law, but a conclusion drawn from the intention of the parties under the circumstances as they existed there. There the rivers and lakes which formed the boundary of the lands granted were small in area and of little importance compared with the extent of lands granted, and it was on this principle that the bed of the river was presumed to be included in the grant of the adjoining lands. The reverse is the case in Canada. Here small tracts of land were granted on the banks of the Great Lakes and large rivers, in which the public had the right of navigation, and it would not be consistent with reason and common sense to hold that the doctrine as applied in England applied here.

The following authorities were referred to in addition to those set out in the judgment appealed from and the judgments of this Court: Farnham on Water and Water Rights, 1904, 36-38, 102-3, 121, 124, 243-6, 249, 308, 1462, 2301-3, 2484; Gould on Waters, 1900, secs. 41, 45, 111; *Robertson v. Watson* (1875), 27 C.P. 579; Angell on Watercourses, 17th ed., 1877, sec. 537, 542-550, 713, note; *Regina v. Fisher* (1885), 1 Ex. C.R. 121; *Attorney-General v. Fraser* (1907), 37 S.C.R. 577; *Esquimalt Waterworks Co. v. Victoria* (1906), 4 W.L.R. 59; 3 Kent's Com., sec. 439; Amer. & Eng. Encyc. of Law, 2nd ed., vol. 21, p. 425; Coulson & Forbes on Waters, pp. 65, 98, 100; Woolrych on Waters, 2nd ed., 42; Hunt on Boundaries, 5th ed., p. 16; *Earl of Ilchester v. Rashleigh* (1889), 5 Times

L.R. 739; *Beatty v. Davis* (1891), 20 O.R. 373; *Anthony Falls Water Power Co. v. St. Paul Water Commissioners* (1897), 168 U.S.R. 349, 359-61.

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January 22. Moss, C.J.O.:—These actions were commenced and carried on to trial with the object and purpose, among others, of restraining the defendants from expropriating any lands or interests therein belonging to the plaintiffs, and from prosecuting arbitration proceedings to ascertain the value to be paid for such lands or interests, and from trespassing on the properties of the respective plaintiffs, and for a mandamus to compel the removal by the defendants of certain structures alleged to be placed by them on the said properties. After the trial had progressed for some time, the parties entered into an agreement whereby the expropriation and arbitration proceedings were accepted and all proceedings to obtain the above mentioned relief were abandoned, and the case was proceeded with for the purpose of enabling the Court to determine the rights and interests of the plaintiffs in their respective properties with a view to instructing the arbitrators as to the basis on which the compensation for the expropriated lands and interests should be ascertained.

How far it was open to the parties and the Court to undertake the ascertainment of the facts bearing on a question of this nature, and forestall the arbitrators in the exercise of their powers and functions in that respect, and to give them by anticipation instructions on questions of law which, in strictness, should only be given upon a case stated by the arbitrators, has not been made a question. The parties appear to apprehend no difficulty arising on this head before the arbitrators, and as the learned trial Judge acquiesced in the course taken, and has dealt exhaustively with the cases, we may express our opinion upon the questions of law determined, or such of them as appear necessary in order to attain the desired end.

Whether, if it was deemed proper or necessary to determine, as a question of fact, whether the watercourse spoken of as the east branch of the Winnipeg River is really a portion of that river, or is in any sense a navigable stream, my conclusion upon the evidence would be the same as that reached by the learned trial Judge, it is not needful to say.

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He had the advantage, which we do not possess, of a personal view and inspection of the *locus in quo*, and, as he states, his views as to the character of the waters at the point in dispute are largely based upon this inspection.

But, in the view I take, it is not necessary to pursue this subject further.

As I gather from the judgment, the learned trial Judge's conclusion of law, based on the assumption that the east branch is a navigable stream, are as follows: (a) The presumption of law is that a grant by the Crown of lands bordering on a navigable stream does not carry title to the thread of the stream; and, therefore, (b) that, notwithstanding the respective grants to the plaintiffs of the lands bordering on the stream in question, the title to the bed remained in the Crown; (c) that there is nothing in the instruments themselves manifesting a grant beyond the shore line or overcoming the *prima facie* presumption; but, on the contrary, (d) they contain language, or, at all events, the grant to the Keewatin Power Co. contains language, which, on a proper construction, rebuts or repels any intention to grant to the thread of the stream; and (e) that the plaintiffs are entitled to the usual rights accorded by law to riparian proprietors, subject, however, as regards the Keewatin Power Co., to the special restrictions specified in paragraphs 2 (b) and 2 (c) of the formal judgment.

The stream or watercourse in question is situate, of course, far from the ocean, and is not subject to its tidal action. It is what is called in England a non-tidal stream, and, if situate there, would not, as regards the presumption as to property in the bed, be subject to the rule of law applicable to tidal rivers. On the contrary, the presumption would be that the grant of the lands on the border of the stream carried with it the ownership of the bed to the thread of the stream, subject, of course, to such public rights of navigation as might exist.

That is the common law of England, as expressed in many decisions of the Courts, and, as the learned trial Judge observes, "the doctrine of the common law, as administered in England, that, whereas in tidal navigable waters the title to the alveus is presumed to remain in the Crown unless expressly granted, in all non-tidal rivers, whether in fact navigable or non-navigable, the title to the alveus is presumed to be in the riparian proprietors,

is too long and too clearly established to admit of any controversy."

Bearing in mind that to-day the law of this Province is, as enacted in R.S.O. 1897, ch. 111, sec. 1, that in all matters of controversy relative to property and civil rights, resort shall continue to be had to the laws of England as they stood on the 15th of October, 1792, as the rule for the decision of the same, except so far as the said laws may have been repealed by Imperial legislation having force in this Province, or by Acts of the Provincial Legislature, the above statement of the law of England might have sufficed to lead to conclusions contrary to those stated under sub-heads (a) and (b). No doubt the learned trial Judge would have so held but for the argument to which he gave effect that, having regard to the many lakes and streams within the territorial limits of the Province, some of which are of great magnitude and very many of which are navigable in fact, the conditions and circumstances of the Province render inapplicable the rule of the common law of England.

In face of the very plain and explicit language of the Act R.S.O. 1897, ch. 111, sec. 1, which has been continued unchanged since its first enactment in 1792, I feel great difficulty in acceding to the suggestion that has been made that no wider rule of interpretation is to be applied to it than is to be given where the question is as to the scope of the laws introduced into a colony acquired by settlement. With much deference, I cannot but think that, under a statute framed as ours, a much larger body of the law, especially of the broad and well-understood doctrines and principles of the common law with regard to property and civil rights, is introduced than is to be deemed to be carried with them by the settlers or colonists of a new uninhabited country. Until the latter have established a system of laws for themselves, it is reasonable and convenient that the administration of the system which they carry with them should be modified and even restricted by considerations applicable to their situation and condition in the new land. But when in the establishment of a system of laws it is distinctly and unequivocally declared that, in controversies relating to certain subjects, such as property and civil rights, resort shall be had to the common law of England as it existed on a certain day, what warrant is there for saying that the rules of property prevailing at that time are not to be ad-

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ministered? Certainly none, unless it can be seen that to do so would lead to manifest absurdity. And in such case the remedy can easily be applied by the Legislature. To what extent such an enactment introduces local Acts of Parliament or local customs, or usages not forming part of the common law, or how far they are to be deemed modified by circumstances, is another question.

But what reason exists for not applying a well-understood doctrine of the common law of England to a non-tidal but navigable stream in this Province, where it is found, as in this instance, that it is short and narrow—indeed, very much shorter and very much narrower than many streams to which the doctrine is applicable in England? It is said that the rule must be of general application, and that to apply it to some streams or the Great Lakes would lead to incongruities and possible absurdities. But is there any ground for saying that the application of the rule of presumption would necessarily lead to such a result? It is nothing more than a *primâ facie* presumption, and, like all rebuttable presumptions, may be repelled by countervailing circumstances. There is nothing incongruous in the fact that in some cases the presumption prevails and in others it is rebutted, and that in that sense the rule does not apply generally to all cases. That is the case in many instances in England, occasionally in tidal streams and not infrequently in non-tidal navigable streams. Whichever *primâ facie* presumption is applicable, it may yield to some extent or wholly to other circumstances. In this case we are not dealing with the Great Lakes nor with a river forming part of the international boundary. But in these instances the *primâ facie* presumption would probably be not difficult of rebuttal. On the other hand, in the case of streams, of which there are not a few throughout the Province, as, for instance, in the Muskoka region, which are navigable for many miles by vessels of considerable size and burden, but which are so narrow as to afford room for only one vessel to pass up or down at one and the same time, it would be very difficult, under ordinary conditions, to repel the presumption.

I am not unmindful of the fact that in a number of instances there are found expressions of very learned and able Judges strongly favouring the view that the rule of the common law is inapplicable

to the Great Lakes and rivers of this country. But, while there are these expressions, there has been no actual decision on the direct point.

So far as the actual decisions are concerned, not one is inconsistent with the continuance of the rule that, in respect to streams of the character of the one in question here, the *primâ facie* presumption is that the proprietorship of the land on the bank carries with it the right to the soil *ad medium filum aquæ*.

The learned trial Judge, in his elaborate and able judgment, refers to all the cases in which the expressions occur, and observes that in none of them does the question now presented appear to have been expressly decided. In this I agree, and I confess that, like him, notwithstanding all that has been said, I see no incongruity and no difficulty likely to result from the application of the rule of presumption arising from proprietorship of the bordering land to our numerous inland rivers which are navigable in fact. As before stated, the presumption is rebuttable.

The point is tersely stated by Lord Blackburn, in *Caldwell v. McLaren* (1884), 9 App. Cas. 392, when he says (p. 404): "They" (their Lordships of the Judicial Committee) "think there can be no doubt that by the law of England the owner of the soil on both sides of a running stream, whether it be navigable or not, is, *primâ facie* at least, owner of the soil which forms the bed of the stream." And later, in 1887, by Bowen, L.J., in *Blount v. Layard*, reported as a footnote to *Smith v. Andrews*, [1891] 2 Ch. 678, at pp. 681, 689: "The natural presumption is, that a man whose land abuts on a river owns the bed of the river up to the middle of the stream, and if he owns the lands on both sides, the presumption is that the whole of the bed of the river belongs to him, unless it is a tidal river. . . . But these are presumptions of fact, which may be rebutted."

It may be noted, in connection with the case of *Barthel v. Scotten* (1895), 24 S.C.R. 367, in which lands in Ontario, situate on the bank of the Detroit River, were in question, that on the opposite shore of that river is the great State of Michigan. The courts of that State have by a long line of decisions established that, "as an incident to the ownership of lands on the margins of navigable streams, the law of Michigan attaches the legal title to the submerged lands under the stream comprehended within

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parallel lines extending perpendicular to the general trend of the shore along his land to the centre of the stream." And apparently the rule applies as well to the Detroit River as to other navigable streams. Indeed, as the learned trial Judge mentions, it has been expressly held to apply to the St. Mary's River, a large navigable stream forming part of the international boundary.

I do not, of course, suggest that the decisions of the Courts of Michigan should be accepted as decisive of any point of law in this Province. I merely refer to the law of Michigan as shewing an apparent "incongruity" in regard to ownership of the bed of the stream on different sides of the same river.

In my opinion, the rule of the common law as to the presumption of title in the beds of the streams, whether navigable or non-navigable, still prevails in this Province, and is to be applied in the first instance. Whether there exist circumstances or conditions sufficient to repel the presumption is a question to be dealt with in the particular case.

I have already said that in the case of the Great Lakes and some of the rivers rebutting circumstances and conditions would not be far to seek.

As regard the stream in question, and many others navigable in fact as well as in law, in *esse* as well as in *posse*, the presumption is not easily overcome.

Primâ facie there is nothing to distinguish them from similar streams in England or Ireland. The conditions are not dissimilar to any appreciable extent, nor does the application to them of the rule lead to any serious inconvenience. The public right of navigation is not thereby affected. In short, there seems no good reason why in such cases resort shall not be had to the law of England as introduced by the statute of 1792.

The remaining question is whether there is anything either in the terms of the grants themselves or in the surrounding circumstances to overcome the *primâ facie* presumption.

As regards the grant to the Hudson's Bay Company, the learned trial Judge points out that the so-called reservations contained in it of the right of navigation and of access to the shore are not inconsistent with the presumption, if it exists. So the reservation of the right to use a strip along the bank one chain in depth for fishing purposes, which seems to have created more

difficulty in the mind of the learned trial Judge, is consistent with the title to the bed of the stream *ad medium filum aquæ*. Without the reservation, the exclusive right of fishing would be vested in the grantees: *Smith v. Andrews*, [1891] 2 Ch. 678. The public would have no right of fishing in it. The reservation merely shews an intention to preserve to the public a right of fishing from the shore with nets which otherwise they would not have. In the absence of the reservation, the grantees would have the exclusive right. A free fishery may exist in private waters by grant or presumption from the owner of the soil. He may grant the right to another or others exclusively or to them in common with himself: *Bloomfield v. Johnson* (1867), I.R. 8 C.L. 68, at p. 107. Here all that the Crown has done is to reserve for the benefit of the public a right which otherwise the grantees of the soil would have been exclusively entitled to.

In the case of the grant to the Keewatin Company, the argument against the presumption rests largely upon the fact that, in addition to the grant of Tunnel Island, the grant comprises two small islands in the west branch of the Winnipeg River, between Tunnel Island and the mainland, a block of land on the south shore of the mainland, and all the islets or reefs of rock and the land under water in the west branch, between Tunnel Island and the block of land on the south shore. It does not seem to me material to consider whether the grant of the island, islets and reefs, and land under water in the part mentioned was made *ex majore cautelâ* or with some other intention. The recitals in the grant do not set forth any application to purchase the islets, reefs and land under water comprised in parcel (e) thereof, and apparently no additional consideration was paid in respect of them. Whatever the reason, the effect is to render undoubted the title to the bed of the stream in the part indicated of the west branch. There may have been some good reasons for supposing that, as respects the west branch, there were conditions which rendered it advisable to put an end to all question in respect to it. But, as respects the portion of the land bordering on the east branch, does it follow that the presumption of the law is overcome? The east branch is a different stream, differently circumstanced, and not calling in any way for special words of grant in order to secure the grantee in the rights usually apper-

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taining to owners of bordering lands. It appears to me that, in order to take away from them that right, something more is necessary than the employment of language which, in itself, is not inconsistent with the existence of the right.

The proviso that the grant is subject to the condition and understanding that nothing therein contained shall be construed as conferring upon the grantees exclusive rights elsewhere upon the Lake of the Woods, or upon any other streams flowing into or out of said lake, must be read with special reference to the fact that exclusive rights have, by force and virtue of the grant, been conferred with reference to the east branch. There is no reservation as in the grant to the Hudson's Bay Company of rights for fishing purposes, and the grant carries with it the exclusive right, subject to the public right of navigation. The proviso must also be read in the light of the fact that the grant affects the two watercourses or streams, and the proviso should, therefore, be taken as referring not so much to them as to other streams flowing into or out of the Lake of the Woods.

On the whole, I am unable to see that the presumption of title is overcome by anything in the grant itself.

In my opinion, it should be declared that the title to the bed of the east branch, as far as the middle of the stream, passed by the respective grants to the plaintiffs of the lands in the east and west banks thereof respectively. The respective plaintiffs are entitled to whatever benefit or advantage is to be derived from such ownership. It is conceded on all sides that they are riparian proprietors, and it is a question whether that does not, in effect, confer upon them rights in the stream quite as valuable in a pecuniary sense as flow from their ownership of the soil. And if that be so, the plaintiffs will, in any event, obtain before the arbitrators the compensation proper to be allowed.

The result will be that the appeals are allowed, and the judgments at the trial are varied so as to give effect to the judgment now pronounced.

The respective plaintiffs are entitled to their costs of the actions and of the appeals. But, in the view of the agreement made at the trial involving the adoption of the expropriation and arbitration proceedings, the costs will not include the costs of and

incidental to the motions for injunction. The disposition made of them by the learned trial Judge should remain undisturbed.

The conclusion reached renders unnecessary any inquiry into the foundations of the law of England as to the title of the Crown in the bed of tidal rivers. But I venture to think that it will be found that the prerogative rights of the Sovereign took their rise in the necessity for providing for the defence of the realm and the protection and safety of the public—the general commonweal of the public at large—rather than the necessity of protecting the rights of the public in navigation and fishing.

MEREDITH, J.A.:—If these actions had come on for trial before me, I would have refused to consider the main question involved in them, for these reasons: the litigation was not real litigation; the actions were actions brought by agreement between the parties for the determination of questions which had not actually arisen between them, and which might never have any substantial effect upon the things which were actually in controversy between them; and the main question involved is one of the very widest range, affecting innumerable titles to land, and essentially one which ought not to be determined except in litigation between persons having a substantial interest involved in its determination, and having the right to have it considered. The parties are engaged in an arbitration respecting the value of certain lands. It may be that the question of the ownership of the bed of the stream in question may become a question of substantial importance in that arbitration, but it may possibly be that, having regard to the undisputed rights of the land owners, the arbitrators may deem the question of the ownership of the bed of the stream of no substantial concern. It would have been quite time enough to have raised any such litigation as this when the arbitrators had found the main question to stand in their way; and, having now ample power, easily exercised, of finding out what the law is, by means of a stated case, they should have adopted that course, and so superfluous—superfluous in any event—litigation would have been avoided. But the actions were heard, and the question I have referred to was considered; and so there is no escape from reconsidering it here, though that does not prevent an expression of regret that other persons, having undoubted and great interests

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of the most substantial character in it, are not before the Court, but are having their real property rights affected in a very substantial way behind their backs, and by litigants who may or who may not be substantially interested in the like manner. As a very general rule it will be found much better not to jump before coming to the ditch.

The main question is, whether the well-settled rule, by which a grant of land abutting upon the highway ordinarily gives title to a moiety of the soil of or under the way, when the grantee is the owner of it, is applicable to inland navigable waters in this Province. That, according to the law of England, title would pass to the *medium filum aquæ* or *via*, as the case might be, cannot be questioned. Such has always been the law of England, though in regard to some waters it does not appear to have been well understood until after Lord Hale's time; that, however, is immaterial.

We start, then, with the indisputable fact that, according to the law of England, the rule would apply to this case whether the river is navigable in fact or not, it being quite out of all suspicion of being a tidal river. Then we have the likewise indisputable fact that, by legislative enactment, the laws of England, as they were on 15th October, 1792, are to be the rule for the decision of such a controversy as this, except in so far as repealed or varied by Imperial legislation having force in this Province, or by the laws of this Province, in its present or earlier stages of existence, still in force. These facts, put together, seem to me to be conclusive against the defendants' contention, conclusive that the rule does apply to the river in question whether navigable or not, it being admitted that there has been no legislation repealing or varying such legislative enactment in so far as it affects this question.

But it is said that the natural conditions of this country are such as to render the rule quite inapplicable to navigable non-tidal waters here. That I quite deny. But, assuming it to be so, is judicial legislation the proper, or is it at all a permissible, remedy? The proper legislature is quite competent to apply all needed relief, and, constantly, shews its readiness to do so, even in matters of comparative insignificance; and it long since legislated in this very matter, in so far as it affects nearly

all public roads, by vesting the soil and freehold in the Crown, and giving the municipal councils jurisdiction over them and vesting such roads in the municipalities: the Consolidated Municipal Act, 1903, secs. 599, 600 and 601. If we may take this subject out of the statutable rule as to the laws of England, we may with equal propriety, or impropriety, take any other subject out of it, because, in plain language, we may think it ought not to have been included. The statute plainly declares what shall come within the rule, namely, "all matters of controversy relative to property and civil rights." It gives no excuse for the introduction of exceptions in the wisdom or at the will or whim of any Court, Judge, or judicial officer. The fact that such legislation has for such a length of time taken the subject out of the realm of common experience, no doubt, accounts for much misunderstanding of its character and some prejudice which may exist against it. But it is founded upon the plainest of common sense, and is a rule of great convenience, not inconvenience. It is but a rule of interpretation, which, of course, gives way when a contrary intention is made apparent, whether in the writing itself or by the surrounding circumstances. It is hardly conceivable that, under ordinary circumstances, a person owning land extending to the middle of the highway, and selling and conveying, intends to reserve the strip under the highway. It is, in almost every instance, a case in which the tail is intended to go with the hide, and the mere fact that the lands are described as abutting on, or extending to, or bounded by, the highway ought not to prevent the land subject to the way passing to the grantee, for it is, in the vast majority of cases, inconceivable that the grantor intended to retain such a strip, absolutely useless, and possibly onerous, to him. The same applies, with at least equal force, to a waterway. And what real difference can it make whether the soil or land is owned by the Crown *jus privatum*, or in the form of the Crown Lands Department of this Province, or is owned by any one else. The *jus publicum* is the same. The Crown may sell, just as any other owner may, and in this very case has expressly sold and conveyed part of the bed of this river; and in selling the Crown Lands Department, just as any other business concern, has an eye to the main chance. This very case affords a striking example of what I mean. This contest

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is not in the interests of navigation, but is really wholly for private purposes and in private interests; that is to say, it is, in truth, but to ascertain who is entitled to the price of the bed of the river which the defendants are acquiring for the purposes of a private dam, a dam which will most effectually stop any such navigation as there might in a state of nature have been where it is to be, and would be a public nuisance if the place were naturally navigable. So that, by reason merely of the navigability of the river, the rule is in no sense even inconvenient. Nor would there be any substantial advantage to the navigator if the bed of the river were held in trust for him; and if it were, ought it not to be so held by the federal authorities, navigation and shipping being within the exclusive legislative authority of Parliament?

But in this case, as in all other cases in which the question is raised, we are confronted with two bogies, now so familiar that, if familiarity rightly breed contempt, they ought not to be viewed with much awe. The one is International Complications; the other the Great Lakes and Rivers. In regard to the first, it is surely enough to point out that, for several thousands of miles, millions of acres of land, not covered by water and privately owned, extend to the international line on both sides, without any sort of neutral or publicly owned zone intervening, and that international complications arising out of such ownership are, happily quite as rare as real ghosts. The fact that in the Great Lakes the land line would be under water would hardly make it more inflammable. But if there were anything in the point, it would be a ground for legislation, or for taking the case out of the rule, not for the exclusion of the rule by adjudication, because incompatible with the circumstances of this continent.

In regard to the Great Lakes, I am not aware whether they have ever been proved to be tide or tideless waters. Though, speaking without any sort of scientific knowledge of the subject, and possibly from darkest ignorance of the subject otherwise, I must say that I would decline to consider them tideless without evidence of the fact. It would seem to me somewhat strange if such bodies of water, though so very small in comparison with the great seas, were wholly unaffected by the attractions of the queen of the night, as well as of the sun. The Mediterranean could hardly be called a tideless sea, though its tides, in most places,

would be entirely unobserved by the unobservant, and the tides of the Great Lakes, even if ten or twenty or thirty times less, and hardly discernible by the most observant, would none the less be tides; their quality would be just the same as that of the stupendous tides of the Bay of Fundy, though in quantity so far apart. But this is, perhaps, useless digression. The *ad medium filum* rule can be applied to these lakes and rivers; it is, of course, inapplicable to the Atlantic Ocean and other great seas, and so some other rule was unavoidable; and what better rule could be adopted than that which Lord Hale declared was always the law of England, and which declaration ever since has been accepted and acted upon as a correct statement of such law? It is just as appropriate to the conditions of this country as it is to those of England. Wherein is it not? Assuming, then, that the Great Lakes are, by reason of not being tidal water or for any other reason, within the *ad medium filum*, what anomaly arises from that; indeed, what difficulty of any sort? If the whole or a great part of this Province had been granted to a great company, like the Hudson's Bay Company, or even to a body such as the Crown Lands Department, and had been described as bounded on the south and south-west by the Great Lakes and rivers, would any one doubt that the grant would carry the title *ad medium filum*, subject to the highway over them? And, if so, is that not in itself a sufficient answer to the suggestions of inapplicability? But it is said, is it not absurd that, if the Crown grant a farm lot of a few acres, or of a town lot of but a few feet, frontage upon one of these lakes, it should carry title to a strip of land perhaps sixty miles deep? Of course it is absurd, and so manifestly absurd as to unmistakeably indicate such a contrary intention as to take the case out of the rule, which, as I have said before, is one construction of the document only, and one which at once gives way to a contrary intention, made apparent by the writing or circumstances of the case. Again, such a case is but a fanciful one, for, as everyone knows, all the lands in this Province are surveyed into lots, generally farm lots of one hundred or two hundred acres, and are not only shewn upon plans of the survey, but are staked at their angles, and sold accordingly, and it is needless to say that these surveys and plans do not extend *ad medium filum*, nor are the stakes placed under the water. The land is invariably

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sold according to such surveys and plans, and this question can hardly, if at all, arise. If it could, could it possibly be held that a lot described as containing one hundred acres more or less, extending to the waters of the lake, conveyed not only one hundred acres, but possibly twenty-five square miles or sixteen thousand square acres. The same considerations apply, with more or less force, to the greater international rivers, and also, with precisely the same force, to the great inland bodies of water not international. So that this scarecrow, too, is quite harmless.

The law of England, therefore, is the rule for the decision of this case; the statute so requires, and the Courts have no more right to endeavour to evade than they have to defy that enactment; and even if that were not so, and if the Courts were at liberty to formulate any other general rule, I am not able to suggest a better one, nor have I heard of a better one suggested by anyone else. Arguments based upon suggestions of inapplicability are but attempts to evade; so, too, arguments based upon the fact that in England, in one sense, only tidal rivers are navigable rivers. The rule has been adopted, and must be applied, for better or for worse, until legislation intervenes.

The cases ought not to present any obstacle, but should make our way plain, for the highest authority we have has recently expressed, in plain unmistakeable words, its opinion upon the subject, an opinion directly opposed to the conclusion of the trial Judge in these actions: see *Caldwell v. McLaren*, 9 App. Cas. 392, at p. 404, and *Farquharson v. Imperial Oil Co.* (1898), 29 O.R. 206. The opinion of the Judicial Committee of the Privy Council, in *Caldwell's* case, was expressed by as able and experienced a Judge as Lord Blackburn, who was certainly not a mere 'prentice hand on such a subject (see such cases as *Plumstead Board of Works v. British Land Co.* (1874), L.R. 10 Q.B. 16, and *Orr-Ewing v. Colquhoun* (1877), 2 App. Cas. 839, such as I and others may, with a strict regard for the truth, confess ourselves to be in comparison with his great experience. Whatever my own views might have been, I would be content, and would feel bound, to give effect to the unequivocal opinion expressed in that case in preference to the dicta of a few among the many Judges, who have sat in these lower courts, to the contrary, leaving it to the Privy Council to recall their words, if it be possible that they were in-

advertedly uttered; for imagining which I can imagine no excuse; to the contrary, having regard to the importance of that case and to the stubbornness with which it was contested throughout, it is at least highly improbable that such dicta were not relied upon in argument, or otherwise made known to the learned members of the Committee, and, if so, the words so much in point in this case would carry even greater weight; it may be that they were so deliberately used.

There is no incongruity in the rule when applied to waters which are navigable; incongruity arises only from misconceptions or forgetfulness, or misapplications, of it. The fact that the stream or other body of water is navigable, or, in other words, a highway, obviously cannot take it out of the rule, for that would take every highway, on land or water, out of it, which no one can contend for. The magnitude of the stream or other body of water may, equally obviously, sufficiently shew a contrary intention, not contrary to the rule, but as the rule expressly provides.

It is not without its amusing features to have the super-tidal waters of Great Britain and Ireland treated as if they were but mere ponds and rivulets when this question is discussed here. It ought not to be, though it may be, necessary to bring to mind the fact that some of the inland waters of the United Kingdom are really not so insignificant, even when compared with such "magnificent water stretches" as the east or the west branches of the Winnipeg River at the Lake of the Woods, though at the place where the dam is to be built the former may have the "magnificent" width of about sixty feet: see *Dwyer v. Rich* (1870), 4 Ir. R. C.L. 424. It is to be hoped that "spread-eagles" or bombast, however much it may naturally infest a new and fresh country in other fields, will not be permitted to invade the domain of its law.

I would allow the appeal on this branch of the case.

On the question whether or not the stream in question is in fact navigable, I agree with the trial Judge, though I find it difficult to understand how any of the parties to this action, or the Crown Lands Department, can very reasonably contend, among themselves, that it is, and least of all the defendants, in the face of the fact that the latter are acquiring the bed of the stream for the purpose of erecting works—including a dam across the

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stream—for a purpose entirely inconsistent with any notion of the existence of a public right of way; and the whole conduct of such parties is opposed to any such right, the object of the defendants being solely to adapt and apply the stream to the productions of water-power for generating electricity, and of the other parties to obtain as much money as possible from them for such of their rights as the defendants may acquire for that purpose. Real navigation in the stream is out of the question; legal navigation to obtain, on the one hand, and to avoid, on the other hand, payment of as much money as possible, is all that there is in it.

And upon the last question, whether the writing itself shews that the parties themselves intended that the rule should not apply, or, more correctly speaking, that a title to a moiety of the bed of the stream should not pass, the defendants have, in my opinion, more than failed to establish the affirmation of the proportion. So far as the plaintiffs the Hudson's Bay Company are concerned, there is, I think, more in support of the presumption than against it, if really the words relied upon ought to have any effect upon it. They are contained in a very common general form of reservation in Crown grants, and probably were inserted without any regard to the actual circumstances of the case, but simply because it was the usual thing to insert them—a perfunctory adhesion to precedent. However, had they been inserted with a view to the circumstances of this particular grant, the more important words would tell very considerably in the grantee's favour. They reserved a right of way over all navigable waters upon the land granted, and as the only navigable waters which apparently could come within the grant are those in question, the conclusion must be that land under them was intended to be included in the grant. On the other hand, they also reserve right of access to the shores of the rivers, streams and lakes, together with the right to use so much of the banks thereof, not exceeding one chain in depth from the water's edge, as may be necessary for fishing purposes. I would have thought that this again excluded the notion of any ownership of the land remaining in the grantees; but it is said that a right of fishing is to be implied, and, because it is implied, there is to be a further implication that, contrary to the rule and the deed, the bed of the

stream was to remain in the grantor, because the right of fishing generally belongs to the owner of the land. But why go so far? Is not the broadest possible implication satisfied by giving the grantors the right of fishing, and, beside that, the reservation is not limited to the stream in question, but covers all the rivers, streams and lakes, whether navigable or not, and it can hardly be contended that the grantees were not to take any land covered by water. It is to be borne in mind, too, that these are but reservations, out of the thing granted, to the Crown, and not to the public.

In regard to the other grants, the questions do not arise out of any general form of words, but out of words directly applicable, and applicable only, to that particular grant. Two things are relied upon by the defendants: first, the expressed grant of an island, which, it is said, would go to the grantees if they took title *ad medium filum*, and, therefore, it appears that they were not so to take. But that is taking very much for granted. In the present state of the authorities one would be rash to say that all islands pass with the bed of the stream, and so it would be but a most obvious precaution to provide in express words for the title to this land, not covered by water, passing. This point, therefore, falls to the ground. But, then, it is said that there is, as unquestionably there is, an express grant of part of the bed of the west branch, along the forty-acre parcel, which under the rule would pass without such a grant, and that, therefore, it is plain that the rule was meant not to apply to any of the parcels granted. If the facts were as so stated, I am not very sure that such a conclusion would follow in this case. The Crown had granted a moiety of the bed of the stream to the other plaintiffs by the other patent; by this patent it was expressly granting the whole of it in a contiguous place; what object could there be in retaining a useless strip of one-half of the bed of the stream in one place, and why treat one grantee differently from another? Public interests could not have been the object, for then the whole bed must have been retained, and it is difficult to perceive how a retaining of the whole bed would materially affect mere rights of navigation. But, unless I am very much mistaken, these considerations are quite immaterial, and, in truth, this express grant of part of the bed of the river, considered conclusive against the application of the rule, is very much more like a conclusive

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fact to the contrary. It may, of course, be that I am very much mistaken, and that is the more likely as the point upon which my opinion turns is one which, as far as I am aware, has not before been mentioned. It is this, that under the grant of the forty acres no part of the bed of the stream could pass, and, therefore, it was necessary to expressly grant it, and it would follow that there was no intention to retain the bed of the river, and that it was not mentioned in regard to the other parcel because it passed under the rule of the law of England in question. That the bed of the river adjoining the forty acres did not pass with the grant of them seems to me to be as plain as can be. It is conveyed by minute metes and bounds. It begins at "*an iron post planted at the water's edge*" of the river, and then runs in numerous courses until it again reaches "*the water's edge*," and thence runs "*along the said water's edge, following turnings and windings, through to the place of beginning*"—that is, the iron post at the water's edge. It is difficult for me to understand how it could ever have been imagined that this rule could be applicable to such a grant: see *Plumstead Board of Works v. British Land Co.*, L.R. 10 Q.B. 16. That the whole of the bed of the stream, instead of merely the half of it, is thus expressly granted has no very great significance.

The appeal should, I think, be allowed generally, and it should be adjudged that the plaintiffs are each entitled to one half of the bed of the stream in question, subject to whatever public right of way there may be, and for whatever it is worth, over the stream. The defendants should pay the plaintiffs' costs.

OSLER, GARROW and MACLAREN, JJ.A., concurred.

G. F. H.

[IN THE COURT OF APPEAL.]

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The agreement with the plaintiffs under which the defendants' railway is operated provides that the track allowances shall be kept free from snow at the expense of the defendants, so that the cars may be in use continuously; and that if the fall of snow is less than six inches at any one time, the defendants must remove the same from the tracks, and shall, if the city engineer so directs, evenly spread it on the adjoining portions of the roadway, but should the quantity of snow at any time exceed six inches in depth, the whole space occupied as track allowances shall be at once cleared of snow, and the snow removed and deposited at such points on or off the street as may be ordered by the city engineer. 55 Vict. ch. 99, sec. 25 (O.), passed to construe the above, enacts that the defendants shall not deposit snow on any street, square, highway or other public place in the city of Toronto without having first obtained the permission of the city engineer:—

Held, that there was nothing in the above to prevent the defendants from sweeping the small snowfalls or the large to the sides of the road by means of an electric sweeper, and (MEREDITH, J.A., dissenting) the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed.

Per OSLER, J.A.—When the snowfall was less than six inches at a time the company might leave it at the side of the road unless that would create a nuisance.

Per GARROW, and MEREDITH, JJ.A.—In all cases the company was bound to remove the snow and ice after sweeping it aside unless the city engineer directed that it be spread there.

THIS was an appeal by the corporation of the city of Toronto from the judgment of the Railway and Municipal Board, under the circumstances set out in the judgments. The appeal was argued on November 14th, 1907, before MOSS, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

J. S. Fullerton, K.C., for the appellants.

H. S. Osler, K.C., for the Toronto R.W. Co., the respondents.

[January 22. OSLER, J.A.:—This is an appeal by the city from the judgment or order of the Railway and Municipal Board made, on an application by the city, to compel the railway company to desist from throwing the snow which falls upon their track allowances on to the sides of the street adjacent thereto without the permission of the city engineer, in alleged violation of clauses 21 and 22 of the agreement under which the railway

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is operated, and of sec. 25 of 55 Vict. ch. 99 (O.), explaining those clauses.

Our jurisdiction to entertain the appeal depends upon sec. 43 (2) of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31. It is confined to questions of the jurisdiction of the Board and questions of law. The preliminary condition of obtaining leave to appeal has been complied with.

The question of law concerns the construction of the clauses of the agreement and the section of the Act above referred to. These are as follows:—

“21. The track allowances (as hereinafter specified), whether for a single or double line, shall be kept free from snow and ice at the expense of the purchaser, so that the cars may be used continuously. . . .

“22. If the fall of snow is less than six inches at any one time, the purchaser must remove the same from the tracks and spaces hereinafter defined, and shall, if the city engineer so directs; evenly spread the snow on the adjoining portions of the roadway, but should the quantity of snow or ice, etc., at any time exceed six inches in depth, the whole space occupied as track allowances (viz., for double tracks sixteen feet six inches, and for single tracks eight feet three inches), shall, if the city engineer so directs, be at once cleared of snow and ice and the said material removed and deposited at such point or points on or off the street as may be ordered by the city engineer.

55 Vict. ch. 99 (O.), (1892). “Sec. 25. And whereas doubts have arisen as to the construction and effect of secs. 21 and 22 of the said conditions, it is hereby declared and enacted that the said company shall not deposit snow, ice or other material upon any street, square, highway or other public place in the city of Toronto, without having first obtained the permission of the city engineer of the said city, or the person acting as such.”

The dispute between the parties is as to the right of the defendants to use an electric sweeper for the purpose of removing the snow from their track allowance. It is conceded or not denied that this is the only practicable method by which it can be removed so as to enable the defendants to give a continuous and uninterrupted service of their cars, but the plaintiffs contend that the sweeper cannot be used without the consent of their

engineer, which has not been given because it brushes the snow from the track allowance to the sides of the street, as it must necessarily do, and thus, as the plaintiffs say, deposits it there contrary to the express prohibition of the Act. The defendants do not deny their obligation to remove the snow and dispose of it under the circumstances and in the manner required by their agreement, but say that the sweeping of it from the track allowance to the road is not a depositing of it there within the meaning of the Act, and this would appear to have been the opinion of the Railway and Municipal Board, as they declined to make an order forbidding the use of the sweeper.

A snow plough and electric sweeper were known methods, at the time the parties made their agreement, of removing snow, and, whichever was used, the effect was to brush the snow to the sides of the road adjacent to the track allowance.

What, then, is the true construction of the clauses in question and of the Act, so far as it declares it?

That a heavy fall of snow or an accumulation of light falls on the track would practically obstruct the tracks for the purpose of a useful and continuous service was well known, and it was equally well known or anticipated that if snow were removed from the tracks and left piled on the sides of the track allowance, persons who used the streets with horses, sleighs or other vehicles would be very likely to get into trouble by falling into the ditch; so that, on the one hand, it was desired to insure a prompt, continuous and uninterrupted car service, and, on the other, to provide that the use of the streets by the public should not be endangered from the cause I have mentioned. These were the objects to be attained by the agreement and the Act establishing it and declaring its meaning.

Take the clauses as they stand. The track allowances are to be kept free from snow and ice, at the expense of the defendants, so that the cars may be used continuously—that is, so far as it is necessary to attain that object. If the fall of snow is less than six inches at any one time it must be *removed* from the track allowances as defined, and, if the city engineer so directs, must be evenly spread by defendants on the adjoining portions of the roadway. But if he does not so direct, there is nothing in clause 22, whatever may be the defendant's obligation at common law not

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to create a nuisance by doing so, which prevents them from leaving the small falls so removed on the sides of the roadway, where accumulations of successive falls might ultimately cause a serious interruption of the traffic. Then comes the statute, which forbids the *deposit* on the streets without the consent of the city engineer. That means, as I understand it, a deposit for the purpose of leaving it there—a final deposit. This must refer to the first branch of clause 22, because the second branch of that clause, which deals with the case of the heavier snow falls, expressly provides for the removal of that and for the depositing of it at such points on or off the streets as may be ordered by the city engineer. That is the sense in which the word “depositing” is used in the second branch of the clause, and the word “deposit” in the declaratory section is, in my opinion, used in the same sense. When a snowfall of more than six inches occurs, the whole space occupied by the track allowances is, if the city engineer so directs, to be *at once* cleared of snow and ice, and the material *removed* and *deposited* at such points on or off the streets as the engineer directs. The first object is to ensure the continuous running of the cars. If that can only or most conveniently be accomplished by first throwing the material off the tracks to the sides of the road, then, subject to any further obligation of the defendants, whether under the agreement or at common law, why is not that a perfectly reasonable way of complying with the agreement and the Act? They must not leave it where they have swept it as a final place of deposit; they must take it off the streets before it becomes a nuisance, just as a waggon, or a load of hay, or a house or anything else must be removed which has been left on the street for a temporary purpose. It becomes a question of the reasonable user of the streets within the meaning of the agreement and the Act, and I can see nothing which prevents the defendants from sweeping the small snow falls or the large to the sides of the road by means of their sweeper, so long as they afterwards deal with it either in accordance with the directions of the engineer or otherwise, so as to prevent it from becoming a nuisance. Thus, their whole duty, whether under the agreement or the Act or at common law, is performed.

The action, or whatever the proceedings before the Board may be called, in my opinion, fails, and the order of the Board should be affirmed with costs.

GARROW, J.A.:—Appeal by the city of Toronto from an order of the Ontario Railway and Municipal Board, dated 23rd April, 1907, dismissing an application by the city in effect to compel the Toronto R.W. Co. to desist from using an electric sweeper to sweep the snow from its tracks in the city of Toronto.

A proper disposition of the application seemed to involve, and was dealt with upon the argument as involving, the consideration and construction of certain clauses in the agreement between the parties under which the railway is operated, and also sec. 25 of 55 Vict. ch. 99 (O.), passed to interpret the clauses in question.

The Railway Board, in the exercise of its discretion under sec. 63 of the Ontario Railway and Municipal Board Act, declined to make the order restraining the use of the sweeper.

The clauses in question read as follows: [setting them out.]

And the section of the statute in question is as follows: [setting it out.]

No difficulty arises upon paragraph 21. It imposes the duty in clear language upon the company to keep the track free from snow and ice so that the cars may be used continuously.

The real difficulty arises as to the disposition of the snow after its removal from the track. What shall be done with it? The tracks are, of course, laid in what are public highways, for the maintenance and repair of which the corporation is by law responsible. Bearing this in mind, it cannot be assumed that, in imposing the duty upon the company set out in paragraph 21, the corporation could have intended that the snow and ice removed from the track should be placed either upon the adjoining or other highway in such a way or in such quantity as to create a nuisance, injurious to the travelling public. The corporation had in law no power to do so—that is, to authorize a nuisance.

If paragraph 21 stood alone, the company would have been compelled to remove the snow and ice, and to dispose of it as they best could—if in harmless quantities, upon the highway; but if in larger quantities, large enough to injuriously affect travel upon the highway, then elsewhere, where it could do no harm. Then paragraph 22 comes in, to some extent in relief of the company, at least in the case of a snowfall of less than six inches at any one time, which they may, *if the city engineer so directs*,

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evenly spread on the adjoining highway. But if he does not so direct, there is otherwise no special provision as to such snowfalls. And failing a direction from the city engineer, they would have to be disposed of as before indicated—that is, where they could do no harm.

So far I see no particular difficulty in understanding the language. The difficulty begins with the latter part of paragraph 22. In the earlier part of the paragraph one specific kind of snowfall—namely, one not exceeding six inches—is dealt with. The latter part, beginning with the words, “but should the quantity of snow or ice at any time exceed six inches in depth,” can scarcely refer to a snowfall of any kind, since ice, which does not usually fall, is also mentioned. Nor is it even clear that it refers only to snow or ice upon the track allowance. My impression is that the first use of the words “snow or ice, etc.,” does not refer to snow or ice upon the track allowance, but to snow or ice upon the highway at the side of the track allowance, and that the intention was that, when a depth or accumulation exceeding six inches had there occurred, then the snow or ice upon the track allowance should no longer be placed upon the side of the track, but should, if the city engineer directed, be removed and deposited where he directed.

What I do not understand is the use of the words “If the city engineer so directs,” where they occur in the part of the paragraph with which I am now dealing. It would appear, as it reads, as if, in the absence of his direction, the snow and ice upon the track allowance, which under paragraph 21 and the first part of paragraph 22, the company is bound to remove, might when of greater depth remain, with the apparent result that there would probably be no continuous service. I cannot help thinking that these words were intended to come in a little later in the sentence; that the intention really was to stipulate absolutely for the removal, which would be in harmony with the earlier provisions, and to make the direction of the engineer applicable only to the disposal of the material.

Then the statute does not, I think, alter the situation. It, in fact, helps to support the view which I take—namely, that the company is bound to keep its track open, in order to give a continuous service; to do so it must at its own expense remove

the snow and ice. And in dealing with it after removal and so as to prevent an undue interference with the rest of the highway, it must act under the direction of the city engineer.

But I see no objection to the use of the electric sweeper as a convenient and expeditious mode of removing the snow from the track and depositing it temporarily upon the highway at the side. That is not, in my opinion, an infraction of sec. 25. "Deposit" there must mean a deposit of a permanent character, and not one made merely in the course of removal to a permanent place.

Of course, the responsibility of the company for the snow swept to the side does not end with the sweeping, but only when they have taken it or dealt with it as directed by the city engineer. If he permits it to be spread at the side, it may be, but if not, it must be removed, no matter what the fall may have been—*i.e.*, whether under or over six inches.

In the result I think the Board was right in refusing the order as asked, and that the appeal should be dismissed with costs.

MEREDITH, J.A.:—We ought not to evade the real question presented by the parties, and of which the interests of each demand a complete and final early solution; we ought, indeed, to be careful to avoid any evasion of that question. That question is not whether the company may employ a sweeper or any other particular means of removing the snow from their tracks, but is whether they may deposit the snow upon the adjoining part of the highway, when the snowfall is not more than six inches at any one time, without the consent of the corporation or the direction of the city engineer to do so. That is not only the substance, but it is also the very form of the question. The corporation's complaint (paragraph 4) explicitly so puts it. The sweeper is not so much as even mentioned throughout it. The company's answer is that brushing the snow to the sides of the street by means of a sweeper is not depositing it on the street within the meaning of the enactment in question. It is difficult, therefore, to perceive how it could be plainer stated that the question is solely whether snow so deposited on the street is "deposited" on it within the meaning of the enactment, and very difficult to understand how it was or is possible to slip away from that ques-

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tion to one affecting the mere means by which the snow is removed, for, surely, the means are immaterial; the effect, by whatever means accomplished, is the thing.

The agreement between the parties early left it open to the parties, who have proved themselves so superlatively litigious against each other, to raise the very question which is now in dispute between them.

That part of paragraph 22 which relates to a snowfall of less than six inches is plain enough when read by itself; it is the following part, relating to a snowfall of more than six inches, when read in connection with it, which opens the way for disputation to the contentious. The *casus omissus* of a snowfall of just six inches does not seem to have caught the litigious eye, and so, perhaps, it may be unwise to mention it, though one likes to be exact, even at the risk of waking someone else's sleeping dogs.

When the snowfall is less than six inches the company shall remove it from their tracks, and shall, if the city engineer so direct, evenly spread it on the adjoining portions of the highway. Their obligation is two fold, but the second part is contingent on the direction of the engineer. They must remove the snow without any direction; if they receive such a direction to do so, they must also spread it evenly as before mentioned. Without such a direction they may remove it whither they will, and dump, use or sell it as they please and lawfully can. With such a direction it must be used for the corporation's purposes, doubtless to make or improve sleighing.

As I have said, the difficulty is evolved out of the provision regarding a depth of more than six inches at any time, in which event it is provided that, if directed by the city engineer, the company shall clear it from their tracks, and remove it and deposit it at such place on or off the highway or street as the city engineer shall order. The differences in this event from the other are in the provision for the direction for the removal, and in the power of the city engineer to order where, whether on or off the street, the snow shall be deposited.

Apart from the agreement of the parties, confirmed by legislation, the company would have no power to deposit the snow removed from their tracks upon any other part of the street. It is well to bear this in mind always. And the agreement confers

no such right, except on the direction or order of the city engineer. So that, quite apart from the legislation in question, I would have no difficulty in reaching the conclusion that the company must remove from its tracks snowfalls of less than six inches at a time, if they would interfere with the continuous running of the cars; and that they could deposit it—by which I mean put and leave it—on the adjoining part of the highway only when so directed by the city engineer. Such are the very words of the agreement.

But the legislation surely puts the matter at rest. It recites that doubts had arisen as to the effect of the agreement in this respect, and settles them by enacting that the company shall not deposit any snow, ice or other material upon any street without the permission of the city engineer. What can this be but a legislative determination of the very question now again raised? What other doubt or question was involved? What escape is there from it? It is said that depositing snow by means of a sweeper is not depositing it within the meaning of the enactment. But why not? Why not quite as much as depositing it in the like manner by means of a snow plough or hand shovels or by any other implement or means? It is difficult for me to imagine anything plainer within the meaning of the word, whether its derivation or its common uses be looked at. Obviously, I would have thought the removal of snow from one place to another, *and leaving it there*, is depositing it there. What other word answers the purpose half as well? To load it into vehicles there would not, nor would merely sweeping it together for immediate removal, be within the meaning of the agreement. In passing it may be observed that the company themselves, in their agreement of February 19th, 1897, describe the work of the sweeper as “a *deposit* of snow . . . on the adjoining portions of the highway.”

To give effect to the company's contention is to enable them to create a nuisance upon the highway, which the corporation must abate at its own cost or else remain, criminally and civilly, liable for the consequences, which could hardly have been intended.

The reasoning of the commissioners seems to me very inconclusive and quite as unsatisfactory as their conclusions. They

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say that the company must, under the agreement, remove the snow from their tracks, but that "removal from the adjoining part of the roadway is not provided for." It is an easy, but very ineffectual, way to get one's burden over the ditch by imagining it there. Why should one look for any such provision until one first finds some right in the company to put and leave the snow there? It is surely more logical to say that the company must remove the snow from their tracks; that they have power to leave it upon the adjoining part of the street only when the city engineer so directs, and, therefore, if they put and leave it there without such direction they are wrongdoers.

Then the commissioners seem to have been carried away by the mistaken notion that, in order to give any relief to the corporation, it was necessary that the use of the sweeper should be stopped; and that it was so useful, if not so necessary, an implement that its use ought to be permitted. It seems strange that they should have acquired the former notion, for they state that when the snowfall exceeds six inches, and they also directed that when the aggregate of the sweepings of lesser snowfalls "attained" that depth, the company shall remove it, if ordered by the city engineer to do so. Whether first removed by sweeper, plough or hand shovel, it must, with present appliances, be removed to the adjoining part of the street, and the street be incumbered to that extent, even if loaded directly into vehicles; that is practically necessary; so it ought to have been obvious that the company might use the sweeper for the first shift, and then, without any unnecessary delay, shift it again, if unable to procure the city engineer's direction to leave it there. They must have known, too, that the company do not wait till after the snowfall of sometimes days' duration; that the plough must always be at work at once, whether the fall turns out to be two or ten inches. And, again, they seem to have considered the present method of sweeping the acme of machinery and method, just as they might have, in their days, deemed the dimly reminiscent white-horsed sweepers of Mr. Osler. But in these days of carpet sweepers, rotary lawn sweepers, hay loaders, suction house cleaners, etc., it is plainly within the bounds of possibility that, if required, a sweeper which will load the snow on cars upon the track, or otherwise efficiently dispose of it without making a

nuisance of it to anyone else, even if not without profit to the company, is almost within hailing distance. But it is enough to say that the question is not whether methods are convenient or inconvenient—effect must be given to the agreement of the parties as supplemented by the legislation in question. It is, however, satisfactory to know that that agreement can be enforced without in the least degree hampering any of the uses of the sweeper, with which the commissioners were so enamoured.

In their reasons the commissioners refer to their discretion; but they have no sort of discretion to make a new agreement between the parties, nor, either with or without the consent of both or either of them, to permit the company to commit a nuisance upon a highway. The rights of all his Majesty's liege subjects to the use of the highway are paramount, and always entitled to first consideration. They were asked to enforce the agreement between the parties, as confirmed and interpreted by the legislation in question; and there having been a violation of that agreement by the company, in their failure to remove the snow, it was the commissioners' duty, under the very purposes of the plain words giving them jurisdiction, to direct the company to do those things which were necessary for the proper fulfilment of the agreement. They have no sort of a capricious discretion.

But it may be said that it would be very unjust if the company were obliged to remove all the snow, no matter how light the fall might be, nor how harmlessly, or, indeed, beneficially, it might be spread on the adjoining parts of the street. But that is not so in fact—if hardship could pervert the meaning of the agreement. Having regard to both paragraphs of the agreement, and with a reasonable application of that useful ingredient, common sense, it is quite plain that the company are not required to remove any snow which does not interfere with the continuous running of the cars. Nor are they at the mercy of the corporation in any other respect. It is not the corporation, but it is the city engineer, who may direct where the snow shall be spread on the adjoining part of the street; and he must act in good faith, as one occupying a quasi-judicial position, so that right may be done and oppression prevented. So long as depositing the snow on the adjoining part of the street aids, or even does not interfere with, traffic, then, in the honest exercise of his power, the city

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engineer will direct that it be evenly spread there; when so spreading it would create a nuisance or impede traffic he will withhold his direction, and the company must dispose of it as best they lawfully can, which is eminently reasonable and proper; it would be entirely unreasonable and improper if they could cast their nuisance upon the public road, and make the corporation criminally and civilly liable for it.

Let me repeat that there is no sort of objection on the part of the corporation to the use of the sweeper so long as the company removes the snow deposited by it upon the highway, or spreads it there under the direction of the city engineer: and that I cannot treat the case except as it substantially is, one in which the real question is whether the company have a right, when the fall is less than six inches, to merely sweep it aside *and leave it there*.

It seems to me that very much needless bickering, misunderstanding and litigation, have arisen between these parties from a failure to recognise the true position of the city engineer, and the power of the Courts to prevent any undue interference with the honest performance of his duties under the agreement in question.

I would allow the appeal.

Moss, C.J.O., and MACLAREN, J.A., concurred in dismissing the appeal.

A. H. F. L.

[IN THE COURT OF APPEAL.]

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Fire Insurance—Lease—Change in Nature of Risk—Absence of Notice or Knowledge by Landlord—3rd Statutory Condition—"Control" of Landlord—Omission to Notify Insurers.

The judgment of a Divisional Court in favour of the plaintiffs was affirmed by the Court of Appeal (MEREDITH, J.A., dissenting), substantially for the same reasons as those appearing in the opinion of the Divisional Court delivered by BOYD, C., 13 O.L.R. 540.

THIS was an appeal by the defendants from the decision of a Divisional Court, reported *sub nom. London and Western Trust Co. v. Canada Fire Insurance Co.*, 13 O.L.R. 540, reversing the judgment of Falconbridge, C.J.K.B., whereby the action was dismissed, and directing judgment to be entered for the plaintiffs.

The action was brought by the plaintiffs, as liquidators of the Birkbeck Loan Company, the owners of a building in the town of Sudbury, insured by the defendants against fire by a policy dated the 10th October, 1904, to recover for a loss by fire on the 30th November, 1905.

The defence was under the third statutory condition, which is set out in the judgments below.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, and MEREDITH, JJ.A., on the 27th November, 1907.

Wallace Nesbitt, K.C., and N. W. Rowell, K.C., for the defendants, appellants. At common law any change material to the risk avoids the policy: see *Thornton v. Sillem* (1854), 3 E. & B. 868, 882, 883. The common law rule sometimes worked injustice where the change was one extraneous to the property insured, over which the insured had no control, and which did not come to his knowledge. The third statutory condition was passed to remove this injustice, and what was contemplated thereby was that a policy should not be avoided by a change which did not come to the knowledge of the assured, and which was beyond the control of the assured, as might well be the case where the change was exterior to the insured premises. The change in the occupation of the premises here was a material one, as is con-

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ceded, and it is clear that it was not notified to the insurers. By reason of the change, the premises ceased to be premises of the character described in the policy, and the risk became a mercantile one. If the defendants accepted such a risk, they would be entitled to receive a premium at least five times greater than that paid. The defendants should not be held liable to pay the loss on a risk which they never assumed. They could not legally issue a three-year policy on a mercantile risk, and no new policy was issued. The assured cannot, under the third statutory condition, by leasing the premises, throw upon the insurers a liability which would not be upon them if the assured himself continued in actual occupation: see *Grant v. Howard Insurance Co. of New York* (1843), 5 Hill (N.Y.) 11; *Kyte v. Commercial Union Assurance Co.* (1889), 149 Mass. 116, 119, 123. The condition is in the nature of a warranty that no change material to the risk shall be made, if within the control of the assured to prevent it; the onus is on the assured to prove that it was beyond his power to prevent the change, and this the assured failed to do: see *North American Fire Insurance Co. v. Zaenger* (1872), 63 Ill. 464. "Control" means the legal right to control the property in respect of the matter in question: see *Padelford v. Providence Mutual Fire Insurance Co.* (1855), 3 R.I. 102; Bunyon on Fire Insurance, 5th ed., p. 166; May on Fire Insurance, 4th ed. (1900), p. 227; Porter on Fire Insurance, 4th ed., p. 197; *Kuntz v. Niagara District Fire Insurance Co.* (1866), 16 C.P. 573; *Liverpool and London Insurance Co. v. Gunther* (1885), 116 U.S.R. 113, 128, reversing the decision in *Gunther v. Liverpool and London and Globe Insurance Co.* (1882), 20 Blatchf. 362. *Heneker v. British America Assurance Co.* (1864), 14 C.P. 57, is in our favour, and was decided by the same Court as the *Kuntz* case. The same line of thought as in *Sillem v. Thornton*, *supra*, will be found in *London Assurance Corporation v. Great Northern Transit Co.* (1899), 29 S.C.R. 577. *Breuner v. Liverpool and London and Globe Insurance Co.* (1875), 51 Cal. 101, is relied on by the Chancellor, but it is directly in the teeth of the English cases and of the decision of the Supreme Court of the United States in the *Gunther* case, *supra*. Reference also to the other cases cited by the Chancellor.

G. C. Gibbons, K.C., for the plaintiffs, respondents. The rent had gone down from \$23 to \$15. There is no evidence of

notice to or knowledge of the plaintiffs or their agent of a change in the risk. There was nothing in the appearance of the house to indicate that it was used as a store; if business was done there, it was in one room only. The landlord is not responsible for changes made by a tenant without his knowledge: *Heneker v. British America Assurance Co.*, 14 C.P. 57; 13 Am. & Eng. Encyc. of Law, 2nd ed., pp. 286, 289; Clement on Fire Insurance, vol. 2, p. 291, rule 5; *Nebraska and Iowa Insurance Co. v. Christiansen* (1890), 45 N.W. Repr. 924, 927; *Merrill v. Insurance Co. of North America* (1885), 23 Fed. R. 245; *North British Mercantile Insurance Co. of London and Edinburgh v. Union Stockyards Co.* (1905), 87 S.W. Repr. 285; *Worswick v. Canada Fire and Marine Insurance Co.* (1878), 3 A.R. 487, 496. Although the assured had no knowledge of the change, the defendants had full notice and knowledge through their local agent, and the defendants are estopped: *Peck v. Phoenix Mutual Insurance Co.* (1881), 45 U.C.R. 620; *Rauch v. Michigan Millers Mutual Fire Insurance Co.* (1902), 91 N.W. Repr. 160, 162; *Naughton v. Ottawa Agricultural Insurance Co.* (1878), 43 U.C.R. 121, 130; *North British and Mercantile Insurance Co. v. Steiger* (1888), 124 Ill. 81; *McIntyre v. East Williams Mutual Fire Insurance Co.* (1889), 18 O.R. 79; May, 3rd ed., p. 1159; Clement, vol. 1, p. 428, rules 29, 30.

Nesbitt, in reply, discussed the cases cited, and referred also to *Moore v. Phoenix Fire Insurance Co.* (1886), 64 N.H. 140; Porter, 4th ed., p. 197.

March 24. Moss, C.J.O.:—I am of the opinion that the judgment of the Divisional Court should be affirmed.

The question has been made to turn almost altogether, if not wholly, upon the proper reading of the words "any change . . . within the control or knowledge of the assured" in statutory condition No. 3, which forms part of the contract of insurance between the parties.

It seems to have been taken for granted that the user made of the insured premises by the Birkbeck Company's tenant, Ferris, was a change material to the risk.

The learned Chief Justice who tried the case states in his judgment that it was admitted that such was the case. No question arises, therefore, on that point, and the case must be dealt with on the footing of a change material to the risk.

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The learned Chief Justice did not find that the change in the mode of user came to the knowledge of the Birkbeck Company, and I do not think that the evidence brings home to the Birkbeck Company either actual or imputed notice or knowledge.

Something was said by the witness Ferris about a renewal of the lease by one J. K. Maclellan, who, acting for the company, had in the first instance made the arrangement for letting the premises to Ferris. The lease then entered into was not produced at the trial, but Ferris deposed that he had a lease, and that it was for six months at \$23 a month; that he paid that rent for six months, and after that \$20 for one month, \$18 for one month, and \$15 for the next month, which was the month in which the building was burned down. A copy of the lease has now been produced. It is an informal instrument, dated the 1st March, 1905, signed by Ferris, who agrees to rent the premises at \$23 per month, payable in advance on the 8th day of each month. Tenancy begins on the 8th March. No term is mentioned except as above stated. It is but a monthly lease, and calls for no renewal. The fair inference is that it continued during the whole of Ferris's occupancy, but at the end of six months—*i.e.*, in September—the rent was reduced to \$20, in October to \$18, and in November to \$15. The fire occurred on the 30th November, 1905. Ferris appears to have paid the rent at Maclellan's office, and there is nothing to shew that the latter had any occasion to visit the premises or that he had acquired knowledge of the change of user.

The policy of insurance was issued on the 14th October, 1904, for three years, and there is no dispute that at that time the premises were being used as a dwelling. The description given in the application and policy was therefore correct. The lease to Ferris made on the 1st March, 1905, was not given for the purpose of enabling him to use it otherwise than as a dwelling, and for the first month he did not carry on any business there.

We have thus the case of premises insured by the defendants correctly described in the application and policy, properly used as described, by the Birkbeck Company and their tenant, until April, 1905, a change then made by the tenant without the Birkbeck Company's knowledge at the time, and without its afterwards coming to their notice. Under these circumstances, was

there on the part of the Birkbeck Company such a non-compliance with the terms of the condition as to disentitle the plaintiffs to recover?

It cannot be denied that the mere leasing of the premises in the condition in which they were, and for the same purposes for which they were used at the time when the insurance was effected, was not an act contrary to the terms of the condition.

Afterwards the Birkbeck Company did no act of their own whereby a change material to the risk was effected, and the change effected did not come to their knowledge. Unless the change was one within their control, the policy was not avoided.

The decisions of our own Courts do not afford much light upon the question, but whatever light is given is favourable to the plaintiffs' contention.

Heneker v. British America Assurance Co., 14 C.P. 57, was well decided upon its facts, but neither the facts nor the language of the condition were the same as in this case. The lease to Lomas (the tenant) was made before the insurance was effected. There were no special restrictions upon the tenant in the matter of erecting further or other buildings. The policy under which the premises were afterwards insured contained a condition which provided that "if after insurance effected . . . the risk shall be increased by any means whatsoever within the control of the insured . . . such insurance shall be void and of no effect." And it was held that the erection of buildings by the tenant after the insurance did not avoid the policy, for it was an act not within the control of the assured, because, under the terms of the lease, the tenant was under no restriction against putting up further buildings, and might during the term of the lease build as much as he pleased without regard to the landlord, provided he did not infringe the rules against waste. In that case the insured had, before the issue of the policy, deprived himself of the control of the premises, and the decision is only useful as shewing that the word "control" in a condition of this character is subject to qualification, and that whether a particular change is within the control of the assured is a matter of fact to be determined upon a view of all the circumstances.

The terms of the condition of the policy in review in the case of *Kuntz v. Niagara District Fire Insurance Co.*, 16 C.P. 573, were

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very general. Any alteration or addition to the building insured or the erection or alteration of any building within the limits described in the application vitiated the policy unless notice was given and the consent of the company was obtained. There was no qualification as to control or knowledge, and it became merely a question of fact whether the allegations as to alterations or additions to the building insured were proved in terms of the pleadings. Control or knowledge was apparently treated as immaterial. These decisions were previous to the enactment by the Legislature of the statutory conditions, the obvious intent of which was to afford a greater measure of security to insured persons than was always obtainable by them under conditions framed by and in the interest of the insurance companies.

And to the words of the condition should our attention be given, rather than to decisions of the Courts in England or the United States. The absence of unanimity in the State Courts in regard to somewhat similar conditions is very noticeable.

Upon the best consideration I have been able to give to the language, it appears to me that the word "control" is not to be read in its widest sense. For acts of which the insured has no previous knowledge or of which he only acquires knowledge too late to save himself by notice to the company, he ought not to be held responsible. Evidently "knowledge" is intended to cover changes happening before the insured was aware of them. There the duty to give notice of the change would arise as soon as there was knowledge. It is not necessary to make "knowledge" apply to the cases of changes made by the insured or directed to be made by him or otherwise directly authorized to be made by him. In those cases the duty of giving notice would at once arise. Control—the fact of checking and directing action—may not be capable of being exercised even though the power exists. An act ever so strictly forbidden by a person possessed of the power to prevent it, if present when it was attempted, may be done without his knowledge.

I cannot suppose that the Legislature meant that in respect of such an act a person insured was to lose the benefit of his policy, except, of course, in the case of the act afterwards coming to his knowledge and his failing without good reasons to give notice before the loss occurred.

In the present case the Birkbeck Company were under no obligation not to lease the property, and that was all they did. They rented it as a dwelling, and there is nothing to shew that they contemplated or intended to countenance a change in the mode of user. Suppose they had inserted in the lease ever so stringent a covenant against the tenant making a change. Can it have been contemplated or intended by the Legislature that if the tenant, in disregard of such a covenant, did make changes material to the risk, which never came to the knowledge of the insured, the result would be deprival of the benefit of the policy? I do not think the language should be so construed.

The words are in the disjunctive, and may not inappropriately be treated as applying to the two kinds of cases—that is, control where there is active intervention, and knowledge where there is no active intervention, but there is subsequent notice of the change.

Here there was neither active intervention or subsequent knowledge, and, there being no other defence, the plaintiffs ought to recover the amount of the policy.

The appeal should be dismissed and with costs.

OSLER, J.A.:—I agree with the judgment of the learned Chancellor in the Divisional Court.

The lease to Ferris by the defunct company of which the plaintiffs are the liquidators was made after the policy, and it seems to have been conceded that the change made by the tenant in the mode of occupying the premises was a change which would avoid the policy, if it was a change within the control or knowledge of the assured, within the meaning of the third statutory condition, which provides that “any change material to the risk and within the control or knowledge of the assured shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent.” The change in question was not known to the assured, and was not notified to the company. The question is, whether it can properly be held to have been a change “within the control” of the assured.

The question is, no doubt, one of some difficulty, to judge from the numerous and somewhat conflicting decisions on the

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subject, and the English cases do not afford much assistance, the English companies not having adopted the condition in question, which is one of those framed by the Judges and imposed by the Legislature upon companies transacting business in this Province. The learned trial Judge seems to have relied upon these cases; and, apart from the condition, they, no doubt, clearly establish that a change material to the risk even if made by a stranger or by a tenant of the assured—if the latter can, as regards the policy, be deemed other than a stranger—would avoid the policy: Bunyon on Fire Insurance, 5th ed., p. 166; May on Insurance, 4th ed., sec. 227; *Sillem v. Thornton*, 5 E. & B. 868, at pp. 882, 883, *per* Lord Campbell. The object of the condition was to place the assured in a more advantageous, perhaps a more equitable, position than he would otherwise be in, and its terms imply that there may be a change which, though material to the risk, is not within the control or knowledge of the assured, and therefore will not affect the policy. It qualifies, in short, changes of that character by limiting them to those within the control or knowledge of the assured. It is common business of an insurance company to insure the owner of property which is then in the possession of a tenant, and it is common knowledge that, even if it is then in the possession of the insured himself, it may be subsequently demised, and that in either case the actual physical control of the demised premises and the actual power to make changes therein, however much against the will or without the consent of the lessor, or even in breach of the lessee's covenant, is in the lessee, who has the legal title and possession of the premises. If the tenant's control is the landlord's control, the unauthorised act of the former may destroy the policy, as it is here contended that it has done, even though it may not come to the latter's knowledge until too late to enable him to give the prompt notice required by the condition. Knowledge of the change subsequently acquired would then be unimportant for the purpose of any useful action by the landlord under the condition, if it must be taken to have been within his control because made by his tenant, since the time for notifying the insurers would have been running from the date of the change. "Control," to my mind, means the actual physical control of the assured in respect of the particular thing

done which is relied upon as effecting the change. It cannot mean the mere power to prohibit either by exacting a covenant from the tenant or by taking legal proceedings against him, since the thing may have been done in the face of the strongest prohibition, and the policy might have become avoided in spite of the promptest proceedings by the landlord after the unlawful act of the tenant had come to his knowledge. I do not see why the plain words of the condition should not prevail. It is simply a question what the parties have contracted for. If the change is made by the assured owner, or by his tenant, with his consent, it is within his control or knowledge. If made by a third person in lawful possession of the insured premises without the knowledge or assent of the assured, he is only required to give notice to the insurer when it has come to his knowledge. I think the case of *Heneker v. British America Assurance Co.*, 14 C.P. 57, was well decided, and that, upon the reasoning of that case, it can make no difference whether the tenancy began before or after the date of the policy. See also *Kuntz v. Niagara District Fire Insurance Co.*, 16 C.P. 573, *per* Wilson, C.J., at p. 578; *North British Mercantile Insurance Co. of London and Edinburgh v. Union Stockyards Co.*, 120 Ky. 465; S.C., 87 S.W. Repr. 285; *Nebraska and Iowa Insurance Co. v. Christiensen*, 45 N.W. Repr. 924, 29 Neb. 572; and other cases referred to in the judgment below.

I would dismiss the appeal.

GARROW and MACLAREN, J.J.A., concurred.

MEREDITH, J.A. (dissenting):—This is not a case to which the doctrine expressed in the words *stare decisis et non quieta movere* can be applied. No case in point, having authority in the Courts of this Province, seems to be discoverable; and, if the judgments of foreign Courts could be looked upon as decisions which ought to be followed, there would be at least as great difficulty in abiding by them, in the proper sense, for they seem to lead to diametrically opposite ends. This case also is not a simple one of law, but depends upon both the proper interpretation of the words used in the contract between the parties and the facts peculiar to it.

In the case of *Heneker v. British America Assurance Co.*, 14 C.P. 57, so much relied upon in the Divisional Court, the property had been leased before the insurance was effected, and the insurers

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took the risk with a knowledge of the tenancy, and the alterations which were made were such as the Court considered within the rights of such tenant, and so beyond the control of the insured; and so that case is very obviously different from this case.

On the other hand, in the case of *Kuntz v. Niagara District Fire Insurance Co.*, 16 C.P. 573, relied upon by the defendants, the condition was that the policy should be avoided by any alteration or addition to the buildings insured, not notified to the company for approval; the controlling words of this case—"within the control or knowledge of the assured"—not being there used. Again, a very obviously different case. The few observations of Adam Wilson, J., in delivering the judgment of the Court, which seemed to give so much satisfaction to the appellants, and are quoted in their reasons for this appeal, do not aid them at all when due regard is had to the sentence ending with the words "in case it was done without his consent or knowledge." But, if it were otherwise, cases are not to be determined in any court by mere observations made by the way.

The question is whether the policy was avoided under the third statutory condition, indorsed upon it, and subject to which it is expressly, in the policy, as well as by virtue of the statute, made. That condition is in these words: "Any change material to the risk, and within the control or knowledge of the assured, shall avoid the policy as to the part affected thereby, unless the change is promptly notified in writing to the company or its local agent; and the company when so notified may return the premium for the unexpired period and cancel the policy, or may demand in writing an additional premium, which the assured shall, if he desires the continuance of the policy, forthwith pay to the company; and if he neglects to make such payment forthwith after receiving such demand, the policy shall be no longer in force." According to the only evidence upon the subject, adduced at the trial, some time after the making of the policy the property was let by the plaintiffs to a tenant for six months, and after such term the tenancy was renewed from month to month, at a reduced rent each month, for three months and until the fire occurred by which it was destroyed. The tenant did not occupy the property as a dwelling-house only, but, with a stock of goods of considerable value which he brought to and stored there and re-

plenished from time to time, he carried on the business of a merchant, who sold to pedlars only, such persons returning frequently to make their purchases, and residing, apparently, in the house until they departed with their purchases. The evidence for the defence shews that, in the introduction and carrying on of this business on the property, which was insured as a dwelling-house, there was a change very material to the risk, and no evidence to the contrary was offered. Indeed it was and is substantially admitted that there was such a change. There is no direct evidence that the plaintiffs had any knowledge of the tenant's business, or of the manner of occupancy by him, but the learned trial Judge seems to have been of the opinion that such knowledge was abundantly proved indirectly. Additional evidence might and should have been given on this question; the lease ought to have been proved and filed at the trial, and the plaintiffs' agent, who alone transacted the business in question for the plaintiffs, ought to have been there examined as a witness; and inferences unfavourable to the plaintiffs might fairly be drawn from their failure to give such evidence, which was quite within their "control," and was of a very material character upon a subject necessarily more or less obscure without it. But, in the view I take of the case, these questions of fact, upon which so much light might have been thrown, are not essential to its proper determination.

After the making of the policy, and with a knowledge that the property was insured as a dwelling-house, and that any change material to the risk, within their control or knowledge, would avoid it, unless continued in the manner set out in the condition, the plaintiffs let it to the tenant, as before mentioned, without any restriction, so far as the evidence shews, as to its user, and thereby conferred upon him the right to make the change, material to the risk, which he did make; and, that being so, how can it be said that the change made was not within the plaintiffs' control? If they had in so many words conferred the right to make the change, could it be argued that it was not a matter within their control? Having just as effectually conferred the power by the words which they did use, by letting the house without any restriction as to the user, the effect must be precisely the same. It does not need the aid of *Heneker's* case to shew that the tenant was within the right conferred upon him by the plain-

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tiffs in carrying on the business upon the property which he did, as before described. It would have been a simple matter for the plaintiffs to have exercised their control by refusing to let for any purpose other than that of a dwelling-house, and, if they desired to retain their contract of insurance, that should have been done; in this instance it would have caused them the loss of this particular tenant, as he desired the property for the purposes of the business he afterwards carried on there, but would have retained their insurance as it was; unless, indeed, they chose, with the defendants' concurrence, the alternative course provided for in the condition; that is, to have saved the tenant and given notice to the defendants. Doing that which their contract of insurance rendered necessary, offering the property only as a dwelling-house, would have plainly revealed the tenant's desire to rent for the purposes of a store, which, if acceded to, would have rendered the notice to the defendants plainly necessary. The fault altogether lies with the plaintiffs.

We must guard against a natural disposition to view this question from the standpoint of an insured's interests only. So too we must remember what the law, coinciding with common sense, is, upon the subject, apart from the special condition in question, and then consider to what extent that condition alters such law. Apart from the condition, any change, material to the risk, avoids the policy, whether the change be made with or without the knowledge of the insured. The common sense of that is obvious. The insurers contract to insure one thing; how can they be held to have insured some other thing of a different and more hazardous character? What justice in compelling them to carry a different risk, the carrying of which might be worth double or treble, or in any other degree substantially greater than, that which they contracted to carry? Then how far does the condition in question impose that obligation upon them? Only to the extent of changes made which are without the control or knowledge of the insured. Again, the natural inclination of the minds of the great body of insured persons is to extend the benefit of the condition so as to construe it as if the words were "control and knowledge" instead of "control or knowledge." There must be cases of knowledge without control—some of which readily suggest themselves; and also of control

without knowledge—some of which also readily suggest themselves; for, if not, why use the two words with the disjunctive conjunction between them? To say that he who confers upon another the right and power to do a certain act had no control over the doing of it seems to me very inconsistent. There are cases in which, though the change be made both without the knowledge and contrary to the order of the insured, yet it must be a change within the provisions of the condition. For instance, the case of the insured's agent, his wife it may be, making the change in their dwelling house, or place of business, in his absence, and against his expressed will. The rule *qui facit per alium facit per se* would surely apply. If made by the insured's tenant, under authority to make it, conferred upon him by the insured, how can it be said that it was not within the insured's control? It was not only within his control, but it was by virtue of such control, exercised in permitting the change to be made, that it was made. It is not necessary to consider, in this case, what would be the effect of a change made by a tenant without the authority, and without the knowledge, of the insured landlord. Such a case would be very materially the opposite of this case.

But it was contended that there was sufficient notice to the defendants of the change to comply with the terms of the condition. In that I am entirely unable to agree. The mere taking of another risk, upon other property, from another person in no way connected with the earlier contract, more than a year afterwards, cannot, by any stretch of imagination, be converted into notice in writing upon which the insurers could act "when so notified." The notice must be in writing, to the company or its local agent, and it would be surely beyond the bounds of reason to consider that the company's agent, when acting in that capacity in an entirely disconnected and independent matter, more than a year afterwards, was acting as agent for the plaintiffs, or giving any sort of "notice" such as the condition requires. Of the cases relied upon for the plaintiffs on this branch of the case, in *Peck v. Phoenix Mutual Insurance Co.*, 45 U.C.R. 620, notice in writing to the company was given through one who was its agent, but how given? Not as agent for the company, but in the insured's behalf, as the notice itself very plainly indicated, beginning as it did, with the words "Mr. Richard Pratt requests me to in-

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form the company," and then going on to give the very notice which the condition required; whilst in the case of *McIntyre v. East Williams Mutual Fire Insurance Co.*, 18 O.R. 79, it was held that written notice had not been given, under circumstances very much stronger in favour of a contention that it had than those of this case. These cases are, therefore, very much against, rather than in favour of, the plaintiffs' unreasonable contention on this branch of the case.

I would allow the appeal and restore the judgment directed to be entered by the trial Judge.

E. B. B.

[MABEE, J.]

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Jan. 13.

RE CRAMP STEEL COMPANY (LIMITED).

Company—Dominion Winding-up Act—Application of Act to Provincial Corporation.

The provisions of the Dominion Winding-up Act (R.S.C. 1906, ch. 144) do not apply to a company incorporated under the Ontario Companies Act unless such company is shewn to be insolvent.

THIS was an application for a winding-up order by shareholders of a company incorporated under the Ontario Companies Act, and was heard before MABEE, J., in Chambers, on January 10th, 1908. The facts are set out in the judgment.

F. Arnoldi, K.C., and *J. A. Paterson*, K.C., for applicants.

W. E. Middleton and *J. A. Ferguson*, for the company.

J. R. Cartwright, K.C., for the Attorney-General of Ontario.

January 13. MABEE, J.:—This is an application by shareholders for a winding-up order under R.S.C. 1906, ch. 144. The company was incorporated under the Ontario Companies Act. There are no creditors, so insolvency cannot be shewn. It was admitted that the applicants had made out a case under sub-sec. (d)*

- * 11. The Court may make a winding-up order,—
 (d) when the capital stock of the company is impaired to the extent of twenty-five per centum thereof, and when it is shewn to the satisfaction of the Court that the lost capital will not likely be restored within one year; or
 (e) when the Court is of opinion that for any other reason it is just and equitable that the company should be wound up.

of sec. 11, and that also sub-sec. (e) might be held to apply to the facts, but it was objected that these clauses had no application to a company incorporated under the laws of Ontario.

There is no doubt that where an Ontario corporation is shewn to be insolvent, a creditor may, by application to the Court, obtain the benefit of the Dominion Winding-up Act, this being legislation upon insolvency which falls within the jurisdiction of the Federal Parliament: *Re Union Fire Ins. Co.* (1887), 14 O.R. 618, (1889) 16 A.R. 161, (1890) 17 S.C.R. 265.

The attempt made here is to apply the provisions of the Dominion Act to a company that has no creditors, the clause that relief is sought under providing that a winding-up order may be made when the capital stock of the company is impaired to the extent of twenty-five per cent. Now, the Steel company in question, not being insolvent, and being a corporate body brought into existence under the Ontario Companies Act, is, of course, subject to the Ontario Winding-up Act, but I am unable to see how it can be brought under the provisions of the Dominion Winding-up Act. If this latter Act provided that the clause in question should apply to provincial corporations, whether insolvent or not, I think it would clearly be *ultra vires*, but it does not so provide, so it is fair to presume that it was intended to apply to such companies as were subject to Federal control or companies incorporated under the Dominion Companies Act.

I think it is clear that the order cannot be made under sec. 11.

It was also contended that the order might be made under sub-sec. (b) of sec. 6,* as the material shews the company is in process of a voluntary liquidation or winding-up. I think the same objection applies to this section—or, in other words, the only clauses of the Dominion Act that can be made to apply to an Ontario corporation are those dealing with insolvency.

The facts shew a proper case for a winding-up order, and as the motion fails only upon the ground that the Dominion Act does not apply, it is dismissed without costs.

G. G.

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* 6. This Act applies to incorporated trading companies doing business in Canada wheresoever incorporated and,—

(b) which are in liquidation or in process of being wound up, and, on petition by any of their shareholders ask to be brought under the provisions of this Act.

[MULOCK, C.J., EX. D.]

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KELLY ET AL. V. ELECTRICAL CONSTRUCTION CO.

Nov. 2.

Company—Election of Directors—Parties—Proxies—By-law Regulating—By-law Proper for Directors—General Power of Shareholders—R.S.O. 1907, ch. 191, sec. 47—7 Edw. VII. ch. 34, sec. 87.

Action by certain shareholders of a company, on behalf of themselves and all other shareholders, except the individual defendants, to have the election of the latter as directors set aside for irregularity:—

Held, that the action must be dismissed unless the plaintiffs obtained the consent of the company to sue in the company's name; as, however, the company was a party defendant and all necessary parties before the Court, it was proper to dispose of the case on the merits, conditionally on such consent being obtained and the record amended.

Under sec. 47 of the Ontario Companies Act, R.S.O. 1897, ch. 191 (7 Edw. VII. ch. 34, sec. 87), by-laws regulating the requirements as to proxies are to be made by directors, and shall have force only until the next annual meeting of the company, and, unless confirmed thereat, shall cease to have force. The shareholders, themselves, therefore have no power to initiate and pass such a by-law at general meeting; and, in the absence of any valid by-law regulating the matter, nothing more is necessary to a proxy than valid execution by the shareholder.

THIS was an action to set aside the election of the board of directors of the defendant company, and for other relief, under the circumstances set out in the judgment. The action was tried before MULOCK, C.J. Ex.D., sitting without a jury, at London, on April 2nd, 1907.

G. C. Gibbons, K.C., and G. S. Gibbons, for the defendants, raised the preliminary objection that the action was not properly constituted, and that it should have been brought in the name of the company: *Macdougall v. Gardiner* (1875), 1 Ch.D. 13; *Mozley v. Alston* (1847), 1 Ph. 790; *Hattersley v. Earl of Shelburne* (1862), 10 W.R. 881, 31 L.J. Ch. 873.

T. G. Meredith, K.C., and J. W. G. Winnett, for the plaintiffs, contended that the objection was too late, misjoinder not being ground for demurrer: *Holmsted and Langton's Judicature Act*, p. 376; and that the case was properly constituted: *Dickson v. McMurray* (1881), 28 Gr. 533; *Davidson v. Grange* (1854), 4 Gr. 377; *Sadgrove v. Bryden*, [1907] 1 Ch. 318.

The Court overruled the objection, and the case proceeded.

Meredith and *Winnett*, for the plaintiffs, contended that any

by-laws regulating proxies were required to be passed by the directors, not, as here, by shareholders at a general meeting: Ontario Companies Act, R.S.O. 1897, c. 191, sec. 47; that the by-laws of the directors were not confirmed by the shareholders at the next shareholders' meeting, as required by the Act; that the statute gave the shareholders the right to vote by proxy, and that right could not be interfered with. They referred to *Dickson v. McMurray*, 28 Gr. 533.

G. C. Gibbons, for the defendant, contended that sec. 47 gave the power to pass the by-law respecting the requirements as to proxies: *Bombay Burmah Trading Corporation v. Dorabji, etc.*, [1905] A.C. 213; *Palmer's Company Precedents*, 8th ed., p. 599; that what was done here afforded no opportunity of examining proxies, which is the object of the statute: *Harben v. Phillips* (1883), 23 Ch.D. 14, at p. 32; that the action was not brought on behalf of the company or of all the shareholders, but for the plaintiffs personally, who were estopped because they were at the meeting of shareholders that passed the by-laws in question; that the by-laws not having been revoked remained the lawful by-laws of the company: *Stephenson v. Vokes* (1896), 27 O.R. 691, pp. 270, 697.

Meredith, in reply, referred to *Holmsted and Langton's Judicature Act*, p. 206; *Pender v. Lushington* (1877), 6 Ch.D. 70.

November 2. MULLOCK, C.J.:—This is an action to set aside the election of the board of directors of the defendant company, and for other relief.

The company was incorporated by letters patent issued on March 17th, 1897, under the authority of the Act respecting the Incorporation of Joint Stock Companies by Letters Patent, being ch. 157 of the Revised Statutes of Ontario, 1887, and now by virtue of sec. 5 of the Ontario Companies Act, R.S.O. 1897, c. 191, it is subject to the provisions of secs. 17 to 105 of that Act.

On February 5th, 1907, the annual meeting of the shareholders of the company was held for, amongst other purposes, the election of a board of five directors. A poll was opened, and on the conclusion of the voting the chairman declared Messrs. Campbell, Workman, Gorman, Heman and Thomas elected, and they have ever since acted as members of the board.

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The plaintiffs contend that they and C. W. Sifton, and not Workman, Gorman, Heman and Thomas, were elected, and they bring this action on behalf of themselves and all other shareholders, except the individual defendants, and ask to have the election set aside, and that defendant Campbell, who was chairman at the meeting, be ordered to declare the plaintiffs and C. W. Sifton to have been elected directors, or for a declaration that the plaintiffs and C. W. Sifton were duly elected in place of the other individual defendants.

The defendants, including the defendant company, by their statement of defence contend that the plaintiffs are not entitled to maintain this action, and that the election was conducted in accordance with the requirements of the by-laws of the company.

The substance of the plaintiffs' complaint is that the individual defendants are usurping the office of directors to the exclusion therefrom of the plaintiffs and C. W. Sifton. As stated below, the evidence does not, I think, shew that a majority of votes was tendered in support of the plaintiffs and Sifton, and therefore the case is narrowed down to the one point—whether the election should be set aside at the instance of these plaintiffs.

If the directors were not duly elected their usurpation of office is an invasion of the rights of the corporation to manage its own internal affairs.

The election of directors is a matter under control of a majority of the shareholders. If the majority are satisfied that the present board should remain in office until the expiration of the statutory term of office, no useful purpose would be served by unseating them, for it would at once be in the power of the majority to restore them to office.

In the management of a company's domestic affairs the board may frequently err as to the manner of doing what the company is entitled to do, as, for example, by doing irregularly or illegally what it has the right to do in a regular or legal manner. In any such case the majority of the shareholders may waive such irregularity or illegality, and it would be purposeless for the Court to entertain an action at the instance of individual shareholders and set aside a transaction of the company, when the next moment the majority of the shareholders might in substance repeat their former action, though in a manner not open to objection. For

instance, what purpose would be served by the Court setting aside an election of a board of directors if the majority of the shareholders were opposed to such action and could at once render it nugatory by re-electing the unseated members?

To avoid such fruitless litigation, the rule, as laid down in *Foss v. Harbottle* (1843), 2 Ha. 461; *Mozley v. Alston* (1847), 1 Ph. 790, and later cases, is well established that in respect of acts within the powers of the company, and thus capable of confirmation by the majority of the shareholders, the Court will not interfere at the instance of individual shareholders. Therefore, I think that unless the plaintiffs obtain the consent of the company to sue in the company's name, the action should be dismissed. It is, I think, a proper case in which they should be given an opportunity for obtaining, if possible, such consent. The board might give it, or it might be obtained from the shareholders in some manner, as, for example, at a special general meeting convened under the provisions of sec. 52 and following sections of the Ontario Companies Act, R.S.O. 1897, c. 191.

The company is at present party defendant, and all necessary parties, either as plaintiffs or defendants, are now before the Court, and have taken part in the real issue of the case. Therefore, it is advisable, I think, that instead of giving effect at this stage to the defendants' objection and dismissing the action, I should, conditionally upon the record being amended, as above indicated, dispose of the case upon the merits.

Dealing, then, with the facts and circumstances of the case, it appears that the dispute as to the result of the election has arisen in consequence of four absent shareholders, represented at the meeting by proxy, not having been allowed to vote.

If they had been, the plaintiffs contend that they and C. W. Sifton would have been elected. The four absent shareholders were E. Holden, the holder of 20 shares; Chas. Sifton, the holder of one share; Chas. W. Sifton, the holder of 13 shares; and G. Gerrard, the holder of 44 shares.

It was shewn that J. B. Campbell, without authority, voted on 7 shares owned by Messrs. Olmstead and Macpherson, and that Thos. Dealy was the holder of 20 shares, which he had pledged to the Dominion Bank, and it was contended by the plaintiffs that under sec. 36 of the Ontario Companies Act, R.S.O. 1897, ch. 191,

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(7 Edw. VII. ch. 34, sec. 67), Dealy was entitled to vote in respect of these 20 shares without any proxy.

The votes cast for the different candidates, not counting those represented by the four proxies hereafter referred to, were as follows: For D. J. Campbell, 177 votes; and for Workman, Gorman, Heman and Thomas, 121 votes each; and for each of the plaintiffs and C. W. Sifton, 56 votes. Deducting the 7 votes improperly counted for Campbell, Workman, Gorman, Heman, and Thomas, there would still remain in their support 170 votes for Campbell and 114 votes for each of the other four, leaving these four in a majority of 58, and the plaintiffs cannot overcome this majority without counting the 44 votes of Gerrard, and at least 14 additional votes.

In the determination, therefore, of the question, it is unnecessary to deal with any special question growing out of the cases of Thos. Dealy or Chas. Sifton.

The following are the circumstances under which the votes of the four absent shareholders were disallowed: E. J. Sifton, having in his possession the written proxies of the four absent shareholders, took them to the company's office the day before the election for the purpose of registering them, and he there made known to Mr. Reeve, the company's bookkeeper and accountant, who appeared to be in charge of the office, his desire to register the proxies, and for that purpose he handed them to Mr. Reeve. The latter not appearing to know what to do with them, Sifton told him to stamp them with the company's stamp, to date the transaction, and to mark them as registered. Reeve did as desired and then handed them back to Sifton, who, placing them in his pocket, took them away. At the election the next day Sifton produced the four proxies and handed them to the chairman of the meeting, contending that the parties in whose favour they were drawn were thereby entitled to vote for the absentees. The chairman undertook to rule otherwise, on the ground that the proxies should have been deposited with the company the day before the election, as required by an alleged by-law of the company, which is in the following words: "All instruments appointing proxies shall be deposited at the head-office of the company at least one day before the date at which they are to be used."

By their statement of claim the plaintiffs contend that, inasmuch as this by-law seeks to restrict the unqualified right to vote

by proxy, conferred on the shareholders by sec. 63 of the Ontario Companies Act, it is *ultra vires* and void.

At the trial, the minute-book of the company, pp. 5 to 10 inclusive, was put in, shewing certain by-laws, including one in the words of that in question, passed by the board of directors on May 13th, 1897, and the defendants also put in what purport to be certain by-laws adopted by the shareholders at the adjourned annual meeting held on May 16th, 1905, which include in their number one in the precise words of the by-law above quoted, respecting voting by proxy.

Before the close of the evidence I called the attention of counsel to the provisions of sec. 47 of the Ontario Companies Act, which, as regards voting by proxy, seemed to empower the shareholders to adopt only such by-laws respecting proxies as had been passed by the board of directors since the annual meeting of shareholders held next before that of May 16th, 1905, and counsel for the defendants thereupon searched in the directors' minute-book for such by-law, but failed to produce any.

Section 77 of the Ontario Companies Act requires directors to cause proper books to be kept, containing minutes of all the proceedings of the board of directors and the by-laws of the company duly authenticated. This implies that such by-laws must be in writing. If, therefore, there exists any directors' by-law passed since the annual meeting of shareholders immediately preceding that of May 16th, 1905, the defendants, being in control of the company's books, should have had no difficulty in producing it, and from its non-production I assume that none such exists.

The first question to determine is whether the by-law respecting proxies passed by the board of directors on May 13th, 1897, or any by-law, was in force at the election of directors held on February 5th, 1907.

Section 47 of the Companies Act declares that the directors may from time to time make by-laws . . . to regulate (e) "the requirements as to proxies . . . but every such by-law . . . unless in the meantime confirmed at a general meeting of the company duly called for that purpose, shall only have force until the next annual meeting of the company, and in default of confirmation thereat shall at, and from that time only, cease to have force, and in that case no new by-law to the same or the like effect

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shall have any force until confirmed at a general meeting of the company."

The directors' by-law of May 13th, 1897, was not confirmed at the next annual meeting after its passage, and thus it ceased "to have force." The only kind of by-law capable of confirmation by the shareholders under the provisions of sec. 47 is one in force at the time of such annual meeting. Thus the by-law in question not being in force at the time of the annual meeting of May 16th, 1905, was not capable of confirmation, but the shareholders at their annual meeting of May 16th, 1905, purported to pass a by-law in the exact language of that of May 13th, 1897, respecting proxies, and it was contended that if the shareholders' by-law did not operate as a confirmation of the directors' by-law it could be supported as a by-law originating in the first instance at a shareholders' meeting, and that, irrespective of the statute, the shareholders had inherent power to pass it as a piece of domestic legislation necessary for the proper carrying on of the affairs of the company.

This contention, I think, cannot prevail. The presumption that a corporation has implied power to pass by-laws necessary for the proper management of its affairs arises only in the absence of express power. Here the Companies Act declares what powers, in respect of proxies, shall be enjoyed by a corporation subject to its provisions, and therefore the question here is not what powers arise by implication, but what are the powers of the corporation having regard to its express statutory powers.

Section 63 of the Companies Act enacts that "at all general meetings of the company every shareholder shall be entitled to as many votes as he holds shares in the company, and may vote by proxy," and sec. 47 declares that the board of directors may pass by-laws regulating the requirements as to proxies. These two sections must be read together, their effect being that each shareholder is entitled to the right to vote by proxy subject to the one qualification, namely, compliance with the requirements of a directors' by-law, which, if not confirmed within the time limited for that purpose, ceases to exist.

Section 47, empowering directors to pass by-laws respecting proxies, impliedly withholds such power from the general body of shareholders. As stated by Vaughan, B., in *Rex v. Westwood*

(1830), 7 Bing. 1, at p. 29: "Wherever a charter confers an express power of making by-laws, as to a particular subject, on a certain part of the corporation (more especially where, as in this case, those terms are very *general and comprehensive*), there is no ground on which a presumption can be raised of an implied power existing in the body at large; but that such power is expressly taken from that body according to the rule, *Expressum facit cessare tacitum*." Were the rule otherwise there might in the present case be in existence at the same time previous to the election two inconsistent by-laws, one passed by the board of directors, the other by the shareholders, prescribing conflicting regulations respecting proxies. It cannot, I think, be seriously argued that the statute contemplated such a possibility. I am therefore of opinion that the express power conferred by sec. 47 upon the board of directors to pass by-laws respecting proxies deprives the body at large of any inherent power to deal with that subject, and therefore the shareholders' by-law of May 16th, 1905, if regarded as originating with that body, is null and void. Then the directors' by-law of May 13th, 1897, not having been confirmed by the shareholders within the time fixed by sec. 47, also became null and void. The plaintiffs did not, by their statement of claim, attack the by-law on the ground that it was merely a shareholders' by-law. Nevertheless this point came up for consideration at the trial, and the defendants unsuccessfully endeavoured to discover a directors' by-law to serve as foundation for the shareholders' by-law.

I therefore see no reason why the plaintiffs should not be allowed the benefit of the point, and think they should be entitled to raise it formally by amendment to their statement of claim.

It would thus seem that when the election of February 5th, 1907, was held there existed no by-law of the company regulating the requirements as to proxies, and those produced at the meeting being in themselves sufficient authorizations, entitled the holders to vote on behalf of the constituents thereof. This they were not permitted to do. The votes which they represented were sufficient to have defeated the four directors whose elections are now challenged, and if it was clear from the evidence that these votes were tendered and for whom, it would be possible to declare the true result of the election. The evidence, however, does not with reasonable certainty indicate for whom these votes would have

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been cast, and I therefore have no sufficient material upon which to amend the election return. All that the evidence discloses is that the holders of proxies were present at the meeting for the purpose of voting; but the chairman having ruled that the proxies would not be recognized and having instructed the scrutineers not to accept votes tendered by the holders thereof, such action resulted in their assuming that it would be useless to press further their right to vote. Had this right not been denied them they would in all probability have voted, and the result of the election might have been different. In such a case the election should be set aside: *Reg. ex rel. Davis v. Wilson* (1857), 3 C.L.J. 165; *Reg. ex rel. McManus v. Ferguson* (1866), 2 C.L.J. 19. Therefore, conditional on the plaintiffs obtaining authority to use the name of the company as party plaintiff, and within a reasonable time amending their statement of claim by making the company a party plaintiff, instead of defendant, and making the formal amendments to the statement of claim consequent on such change, the election of the defendants Workman, Gorman, Heman and Thomas should be set aside and a new election had.

It would, I think, be expedient that the four directors in question should continue in office until the election of their successors. The parties may be able to agree upon a convenient date for holding the election, the same to be stated in the judgment, otherwise I shall have to name the date. If the plaintiffs fail within a reasonable time to obtain authority to sue in the company's name and to make the necessary amendments, the defendants may, on 24 hours' notice, bring the fact of such failure before me on affidavit or other evidence, and in the meantime no formal judgment to be entered. It is not a case calling for any order as to costs.

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[DIVISIONAL COURT.]

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Dec. 21.

Divisional Court—Appeal—Right of Judge to Sit on Appeal from Himself—Staying Execution Pending Appeal and Trial of Counterclaim—Ontario Judicature Act, sec. 70 (2)—Con. Rule 827 (2).

By sec. 70 (2) of the Ontario Judicature Act, R.S.O. 1897, ch. 51, a Judge is disabled from sitting as a member of the Divisional Court hearing an appeal from a judgment or order made by himself, and he has therefore no jurisdiction, after the setting down of an appeal from his judgment, to make an order that execution shall not be stayed.

In an action for goods sold and delivered the defendant counterclaimed for trespass. The plaintiff recovered judgment at the trial of his claim, and the trial of the counterclaim was adjourned. The defendant appealed to the Divisional Court, on the ground that the amount for which the plaintiff had recovered judgment should be reduced by \$214.50 as damages for breach of warranty:—

Held, that the trial Judge had no jurisdiction to make an order on application to him under Con. Rule 827 (2) that execution should not be stayed, notwithstanding that an appeal to this Court had been set down; but that as the order was a proper one on the merits, execution should not be stayed save as to the \$214.50, as the counterclaim was not one which should have been joined with the action, and it was not shewn that if a verdict were obtained on the counterclaim, there would be any danger of the amount not being recoverable from the plaintiff; and that, as to the \$214.50, it was proper to stay execution, notwithstanding affidavits on behalf of the plaintiff of his belief that the defendant's appeal was merely for delay, and as to his uncertainty in respect to the defendant's financial ability to pay the claim, there being no suggestion or evidence that by staying the execution to this extent the plaintiff would probably lose his claim.

THIS was a motion by the plaintiff, under Consolidated Rule 827 (2), for an order that execution should not be stayed in this action, notwithstanding a pending appeal to a Divisional Court, and was made before RIDDELL, J., in Chambers, on December 20th, 1907.

The circumstances are set out in the judgment.

J. H. Denton, for the plaintiff.

H. D. Gamble, for the defendant.

December 21. RIDDELL, J.:—This was an action tried before me at the non-jury sittings, at Toronto. The plaintiff claimed the price of a quantity of sand delivered from his pit and received by the defendants. The defendants say that the sand delivered was inferior to what the plaintiff had represented it would be, and also counterclaimed: "That . . . the plaintiff entered the

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office of the defendants . . . and upset and threw the office into confusion; throwing on the floor the office books of account of the defendant company, and abusing and otherwise annoying the employees and servants of the company;" and for this they claimed \$200.

At the trial I found the facts against the defendants in the claim, and directed judgment to be entered for the plaintiff upon his claim for \$738.75. The defendants were not ready to go on with the trial of their counterclaim by reason of the absence of a material witness, and I gave them the option of withdrawing the counterclaim and bringing a new action, or of adjourning the trial of the counterclaim. They accepted the latter alternative. The counterclaim has not yet been tried, neither party being at fault respecting the delay.

I refused to stay the issue of the judgment until the trial of the counterclaim. Upon the same day judgment was entered and execution issued and placed in the hands of the sheriff of Toronto. The defendants served notice of motion to the Divisional Court, claiming \$214.50 for damages for breach of the plaintiff of his contract as to the quality of the sand; and thereupon applied for a fiat on December 12th. A fiat was granted to set down the appeal and (no doubt *per incuriam*) also to stay the execution. Consolidated Rule 828 provides that upon an appellant becoming entitled by setting down an appeal to the Divisional Court to a stay of execution, a fiat may issue staying the execution in the hands of the sheriff. This fiat cannot, however, issue under this Rule unless and until the appellant has become entitled to a stay, which at the time of the application he was not. The appeal is set down.

A motion is now made by the plaintiff, under Rule 827 (2)* for an order that the execution shall not be stayed, notwithstanding the setting down of the appeal. This motion is in no way an appeal

* Rule 827 (1) : Unless ordered by the Court appealed to or a Judge thereof, the execution of the judgment or order appealed from shall, in the case of a motion or an appeal to a Divisional Court, upon the motion or appeal being set down for argument . . . be stayed pending the motion or appeal, except in the following cases :—

(a)

(2) Upon special application, the Court appealed to or a Judge thereof may order that execution shall not be stayed, in whole or in part, except on such terms as may seem just. . . .

from the fiat, but is a motion rendered necessary, as it is contended, by the stay automatically effected by the setting down of the appeal.

It is objected that I am not "a Judge" of "the Court appealed to," it being contended that the appeal is to a Divisional Court, and that under sec. 70 (2) of the Ontario Judicature Act, R.S.O. 1897, ch. 51,* I am precluded from sitting in a Divisional Court upon this appeal. I have had the opportunity of consulting with a number of my brethren, and I think that the objection is without foundation. Section 68 of the Act provides that the King's Bench, Chancery, Common Pleas and Exchequer divisions shall not sit as such divisions; and there shall be no Divisional Courts of any of these divisions; but the Divisional Courts shall be Divisional Courts of the High Court. An appeal is taken to "a Divisional Court of the High Court or to the Court of Appeal": Rules 782, 783; and where to a Divisional Court it is really to the High Court. Where Rule 827 (1) or (2) speaks of "the Court appealed to," the distinction is indicated between the Court of Appeal and the High Court, not between certain members of the High Court and other members of the same Court. The objection is overruled. In my judgment, motions of this kind are generally best made before the Judge who tried the action and who should be most conversant with the facts. As to that, however, much may be said on both sides.

On the merits, I should not think of staying the execution until the trial of the counterclaim, even if it be seriously intended to proceed with a claim that cannot be expected to result in a substantial verdict. The counterclaim is in my view, in any event, one which should not have been joined with the action. Many cases are cited in Holmsted & Langton's Judicature Act, pp. 459-461, where just such counterclaims were held not such as could be conveniently tried in the action.

There is no suggestion that the plaintiff is not a man of substance, or that if a verdict were obtained upon the counterclaim there would be any danger of its not being paid.

As to the claim, it will be noticed that the sole ground of appeal is that the defendants should have been allowed damages (which they fix at \$214.50) for breach of warranty. There is no appeal

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* Sec. 70 (2): No Judge shall sit as a Judge on the hearing of an appeal from any judgment or order made by himself; but subject to this provision every Judge of the High Court shall be qualified and empowered to sit in any of such Divisional Courts.

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against the remainder (\$738.75 minus \$214.50), \$524.25, and no ground is alleged why this should not be paid. The execution should not be stayed as respects this sum, namely, \$524.25.

In respect of the \$214.50, it must be kept in mind that "the general rule and the right of the appellant is that, save in the excepted cases, proceedings below are stayed upon the appeal being perfected . . . A proper case must be made out for allowing the respondent to enforce what has not yet become a final judgment, the appeal being a step in the cause": *Centaur Cycle v. Hill* (1902), 4 O.L.R. 92, at p. 95. All that is shewn here is the belief by the plaintiff that the defendants have no defence to the action, and that their present appeal is merely for the purpose of delay, added to the affidavit of the plaintiff's solicitor that the plaintiff has expressed considerable anxiety as to the financial ability of the defendants to pay the claim, and the solicitor's own belief that the defendants' appeal is to delay the plaintiff and obtain more time to raise the money. There is no suggestion that by staying the execution the plaintiff will probably lose his claim, and no facts are set out from which such an inference can be drawn.

On the present material I do not think that the motion can succeed to the full extent, but I reserve leave to the plaintiff to move again in case facts come to his notice indicating danger to his claim.

As to the costs to which the plaintiff is entitled under the judgment, I understand that the execution does not cover them; so that there will be a sum against which to draw for costs which may be awarded to the defendants by an Appellate Court.

The order will be that the stay effected by the setting down of the appeal be removed to the amount of \$524.25, unless the defendants pay that sum to the plaintiff's solicitor upon the judgment on or before December 26th, 1907.

Costs of this motion—if the pending appeal be proceeded with—to the plaintiff in the appeal—if the appeal be not proceeded with—to the plaintiff in any event. The principle upon which I proceed is that as the plaintiff has succeeded in part he should not pay costs in any event; and if the appeal is simply for time or if it turn out to be ineffectual, the plaintiff should be paid his costs.

The defendants appealed, and the appeal was argued on January 21st, 1908, before BOYD, C., and ANGLIN and MABEE, JJ.

H. D. Gamble, K.C., for the defendants, contended that the learned Judge should not have sat on the motion to set aside the stay of execution in this case: Ontario Judicature Act, R.S.O. 1907, ch. 51, sec. 70, sub-sec. 2; that sec. 68 had changed the practice as it previously existed in the Act of 1895, 58 Vict. ch. 12, sec. 63 (O.); that sec. 68 means that all Judges may sit, except the Judge appealed from; and that on the merits the motion should not succeed. He also referred to *Centaur Cycle Co. v. Hill*, 4 O.L.R. 92; *Confederation Life Association v. Labatt* (1899), 35 C.L.J. 443; *Rice v. Rice* (1899), *ibid.* 535; *Wintemute v. Brotherhood of Railway Trainmen* (1899), 19 P.R. 6.

J. H. Denton, for the plaintiff, contended that there were only two Courts, the High Court of Justice and the Court of Appeal; that properly speaking there is no such Court as a Divisional Court, the appeal is to the High Court, and as the Judge of the High Court the Judge below was entitled to sit: *Regina v. Bunting* (1884), 7 O.R. 118; *Centaur Cycle Co. v. Hill*, at p. 94; that on the merits the execution should not be stayed.

PER CURIAM:—The learned Judge had no jurisdiction to make the order in question, which must be set aside. As, however, the order made was a proper one on the merits and a new order must be made to the same effect, there will be no costs.

A. H. F. L.

[DIVISIONAL COURT.]

THE A. R. WILLIAMS MACHINERY CO., LIMITED, V. THE
CRAWFORD TUG CO., LIMITED, AND J. T. CRAWFORD.

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Company—Right to Guarantee Debt of Another—Ultra Vires.

Jan. 31.

It is *ultra vires* of a tug company, incorporated for the purpose of carrying on a general carrying, towing, wrecking, and salvage business in all its branches, to guarantee payment by the owner of a tug employed by the company of a boiler purchased by him to operate the tug.

THIS was an appeal from the refusal of his Honour Judge Barrett, Judge of the eighth division court in the county of Bruce, to enter judgment for the plaintiff in this action as against the de-

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endants, the Crawford Tug Co., Limited, upon the application of the plaintiff for that purpose, or for a new trial, under the following circumstances:—

One Koch, owner of the tug employed by the Crawford Tug Co., required a new boiler to enable him to operate the tug. Owing to his financial position he could not obtain this boiler, and to enable him to secure a contract with the plaintiff for the supply of the boiler, the following guarantee was given:—

“We guarantee the above contract. The Crawford Tug Co.

“(Sgd.) J. T. CRAWFORD.”

The boiler was supplied by the plaintiff on the faith of this guarantee, but Koch failed to pay, and this action was brought against the defendants.

The defendant company was incorporated on January 19th, 1893, by letters patent under the Dominion Companies Act, R.S.C. (1886), ch. 119. The objects mentioned in the letters patent were as follows:—

(a) The constructing, acquiring, chartering, navigating and maintaining any steam vessels or sailing vessels or other vessels for the purpose of carrying and conveying passengers, goods, mails or other traffic; and for the purpose of carrying on a general carrying, towing, wrecking and salvage business in all its branches, upon and over any of the navigable waters within or bordering upon the Dominion of Canada, to and from any part therein, and to and from any foreign port.

(b) To construct or acquire any elevators, docks, offices or building that may be necessary for the carrying on of the company's business.

The learned division court Judge's judgment was as follows:—“The suit is brought for goods sold under lease lien of one Julius Koch, and guaranteed by the defendant, John T. Crawford.

“At the trial I expressed the opinion that guaranteeing the payment of goods sold, as here alleged, was no part of the defendant company's business, and I find nothing in any of the cases herein cited to me that should cause a change of that view; therefore, the plaintiff cannot recover against the tug company.

“The claim against J. T. Crawford is for a misrepresentation as to the authority he had to give such a guarantee for the com-

pany. There was no evidence to support this claim, and the amount claimed, being \$141, makes it out of the jurisdiction of the Court, as in personal actions \$60 is the limit.

"The plaintiff's action must, therefore, be dismissed with costs."

The appeal was argued on January 24th, 1908, before BOYD, C., ANGLIN and MABEE, JJ.

W. E. Middleton, K.C., for the plaintiff, contended that what had been done was incident to the business of the company, and to assist a sub-contractor, and was *intra vires*: *Attorney-General v. North-Eastern R.W. Co.*, [1906] 1 Ch. 310, 316; *Breay v. Royal British Nurses' Association*, [1897] 2 Ch. 272; *Green's Brice's Ultra Vires*, p. 718; *English Ency. of Law*, vol. 3, 2nd ed., p. 259, *sub. voc.* "Company."

J. Jennings, for the defendant, contended that it was *ultra vires* to guarantee, and that the guarantee was not under seal, as it should be: *Barnett, Hoares & Co. v. South London Tramways Co.* (1887), 18 Q.B.D. 815; *Ladford v. Billericay Rural District Council*, [1903] 1 K.B. 772; *Brice on Ultra Vires*, 3rd ed., p. 269; that there was nothing to shew that the company got any benefit from this guarantee.

Middleton, in reply, contended that a trading company need not use a seal: *National Malleable Castings Co. v. Smith's Falls Malleable Castings Co.* (1907), 14 O.L.R. 22.

January 31. The judgment of the Court was delivered by BOYD, C.:—Giving a guarantee by a joint stock company, incorporated to do defined things, to answer for the debt of a person who does work for them, if not within the general or special powers of the company, must be justified on the ground that it is incidental to the main purposes—that there is a potential necessity for entering into the guarantee, and that, therefore, there is a reasonable implication of power to do it. I use expressions drawn from the language of Lord Selborne in *Small v. Smith* (1884), 10 App. Cas. 119, at pp. 129-133. In the same case Lord Blackburn says the authority "which is given to the directors is to manage all the affairs of the society according to the nature of its business. . . . According to that they might

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do very much the same things which by common law a partner in a business limited in the same way would be entitled to do," and he refers to *Brettel v. Williams* (1849), 4 Exch. 623, 632. That case is pretty close to the present. A partnership of railway contractors agreed to do certain work on a railway. U. & K. made a sub-contract with the defendant to do part of the work, and for that purpose required coals to make brick, and one of the partners signed a guarantee for the payment of such coals to be supplied to U. & K. Held, that the guarantee was not necessary for carrying the partnership contract into effect—though it might be convenient for that end—and, therefore, the partnership was not bound.

This reason is sufficient to dispose of the appeal. The only evidence of any relation between the person who bought the new boiler and the tug company is that "he was doing work for the company on the bay." A more remote relation than existed in the Exchequer case cited.

There is also a formidable obstacle presented in the fact that the guarantee is signed for the company by one Crawford, who was in 1902 secretary of the company. No evidence is given as to his power or authority, and it cannot be assumed that his signature binds the corporation. The incorporation is under R.S.C. (1886), ch. 119, and sec. 76 provides that every contract, engagement, etc., made on behalf of the company by any officer or servant of the company, in general accordance with his powers as such under the by-laws of the company, shall be binding on the company. Proof is lacking as to such by-laws or other means of enabling the secretary—who is a mere servant of the company—to create a binding engagement by way of guarantee, even if it be within the power of the corporation to become surety for the debtor Koch.

The appeal should be dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

WHALEN V. WATTIE.

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April 3.

Appeal to Divisional Court of High Court—Division Court Appeal—Division Courts Act, sec. 158—Amendment—Filing Certified Copy of Proceedings—Extension of Time for—Jurisdiction.

A Divisional Court of the High Court, which is the Court for hearing division court appeals, has no power to extend the time limited by sec. 158 of the Division Courts Act for filing the certified copy of the proceedings in the division court, and has no power, under sub-sec. 2 of sec. 158 (as added by 4 Edw. VII. ch. 12, sec. 2), or otherwise, to extend the time for setting down the appeal until it is seised of the appeal by the filing of the certified copy, the time for filing which may be extended by the Judge in the division court.

MOTION by the defendant to extend the time for filing the certified copy of proceedings in the 1st division court in the district of Muskoka and to extend the time for setting down an appeal by the defendant from an order of the Judge or acting Judge of the district court of Muskoka, presiding in the division court, refusing a new trial after a judgment in favour of the plaintiff.

The action was for the price of cattle sold by the plaintiff to the defendant. Judgment was given on the 11th January, 1908, in favour of the plaintiff for the recovery of \$119. A motion for a new trial was made by the defendant in February, and an order refusing it was pronounced on the 8th February, but, as the defendant contended, he was not notified of it until the 28th February. The defendant, however, did not, owing to some misapprehension, file the certified copy of the proceedings in the division court within two weeks, even reckoning from the later date, though he intended to appeal, and later served notice of a motion to extend the time.

The following provisions of the Division Courts Act, R.S.O. 1897, ch. 60, are applicable:—

154.—(1) In case a party to a cause . . . wherein the sum in dispute upon the appeal exceeds \$100 exclusive of costs, is dissatisfied with the decision of the Judge, upon an application for a new trial, he may appeal to a Divisional Court of the High Court of Justice, and in such case the proceedings in and about the appeal shall be the same as on an appeal from a county court, except where otherwise provided by this Act. . . .

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157. The clerk of the court in which the action or proceeding is pending, shall, at the request of the appellant, . . . furnish a duly certified copy of the summons with all notices indorsed thereon, the claim, and any notice or notices of defence, and of the evidence and . . . all other papers filed in the cause affecting the questions raised by the appeal; . . .

158. The appellant shall, within two weeks after the date of the decision complained of or within such other time as the Judge may by order in that behalf provide, file the said certified copy with the proper officer of the High Court, and shall thereupon forthwith set down the cause for argument at the first sittings of a Divisional Court which commences after the expiration of one month from the decision complained of, and shall give notice thereof and of the appeal and of the grounds thereof, to the respondent . . . at least seven days before the commencement of such sittings. . . .

Section 158 is amended by 4 Edw. VII. ch. 12, sec. 2, by adding thereto the following sub-section:—

(2) The Divisional Court shall be deemed to be seised of the appeal if and when the said certified copy shall have been filed as aforesaid; and, subject to rules of Court, may extend the time for setting down the cause for argument and the time for giving notice thereof and of the appeal and of the grounds thereof, and for doing any act or taking any proceeding in or in relation to the appeal; and may, if the certified copy filed is incomplete or inaccurate, direct the same to be amended or to be sent back to the clerk for amendment; and may also allow the notice of the grounds of appeal to be amended as may to the Court seem just.

The motion was heard by a Divisional Court composed of FALCONBRIDGE, C.J.K.B., BRITTON and CLUTE, JJ., on the 31st March, 1908.

R. U. McPherson, for the defendant. The Court has, by the amendment of 1904, power to extend the time for setting down and giving notice, which involves the power to extend the time for filing the certified copy of the proceedings. If there is power, the Court should relieve the defendant from the consequences of a mere slip.

A. J. Thomson, for the plaintiff. The time for filing the certified

copy cannot be extended by this Court: *Owen v. Sprung* (1897), 28 O.R. 607. But, if there is authority, there is no good reason for making the order.

McPherson, in reply. The practice is liberal in respect of extending the time. The latest case is *Ross v. Robertson* (1904), 7 O.L.R. 464.

April 3. FALCONBRIDGE, C.J.:—It is beyond question that the jurisdiction of the Divisional Court to extend the time for doing any act in or in relation to the appeal depends on its being seised of the appeal, and that it is deemed to be seised of the appeal “if and when the said certified copy shall have been filed as aforesaid:” 4 Edw. VII. ch. 12, sec. 2, amending sec. 158 of the Division Courts Act. I can assign no force or effect to the words “as aforesaid” except by reference to the time-limit of two weeks set by the amended section—R.S.O. 1897, ch. 60, sec. 158.

This Court is, therefore, not seised of the appeal, and has no power to extend the time for filing the certified copy of the proceedings.

The motion must, therefore, be dismissed with costs, without prejudice, however, to the case being set down, if the acting Judge or the Judge of the district court should see fit (in the words of sec. 158) to provide other or further time for filing the copy.

BRITTON, J.:—I agree.

CLUTE, J.:—It was conceded by the defendant’s counsel that the defendant had not filed the certified copy of proceedings with the proper officer of the High Court, within two weeks after the date of the decision complained of, and that the county court Judge had refused to extend the time, as required by sec. 158 of the Division Courts Act.

It was, however, urged on behalf of the defendant that the amending Act, 4 Edw. VII. ch. 12, sec. 2, enables the Divisional Court to extend the time for filing the certified copy of proceedings and setting down the case for argument. The amending section provides that “the Divisional Court shall be deemed to be seised of the appeal if and when the said certified copy shall have been filed as aforesaid; and, subject to rules of Court, may extend the time for setting down the cause for argument and the time for

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giving notice thereof and of the appeal and of the grounds thereof, and for doing any act or taking any proceedings in or in relation to the appeal."

I think this power of extending the time for appeal is dependent upon the Court being seised of the appeal, and that it is only so seised "if and when the said certified copy shall have been filed as aforesaid;" that is, within two weeks or such further time as the Judge below may order.

I am of opinion that, upon the facts in this case, this Court, not having become seised of the appeal, has no jurisdiction to extend the time for setting down the cause for argument.

The motion must be dismissed with costs.

E. B. B.

[DIVISIONAL COURT.]

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Jan. 23.

BARKER v. FERGUSON.

Landlord and Tenant—Defective Roof—Demise of Part of Premises—Implied Covenant for Repair.

There is no implied covenant on the part of a landlord to protect a tenant of the ground floor against water percolating through a defective roof. A tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such defects as are apparent, otherwise he will have no remedy afterwards against the landlord for damage caused by such defects. *Rogers v. Sorell* (1903), 14 Man. R. 450, specially referred to.

THIS was an appeal by the plaintiff from the judgment of nonsuit given by the junior district Judge of the district of Nipissing at the trial of this action at North Bay on November 12th, 1907. The facts are stated in the judgment.

The appeal was argued on January 21st, 1908, before BOYD, C., and ANGLIN and MABEE, JJ.

G. H. Kilmer, K.C., for the plaintiff, contended that there was an implied agreement by the defendant for quiet enjoyment; that it was the defendant's duty, as landlord, to keep the roof in repair,

and it was not under the control of the plaintiff: *Miller v. Hancock*, [1893] 2 Q.B. 177, especially at p. 181; *Hargroves, Aronson & Co. v. Hartopp*, [1905] 1 K.B. 472; *Snarr v. Beard* (1871), 21 C.P. 473; that in this case the defendant had expressly said that water would not come in again.

J. M. Ferguson, for the defendant, contended that the plaintiff asked no questions as to the condition of the stores, and moved in without notifying the defendant, and that he, therefore, waived any rights he might have: *Rogers v. Sorell* (1903), 14 Man. R. 450; *Humphrey v. Wait* (1873), 22 C.P. 580. He also referred to *Brown v. The Trustees of the Toronto General Hospital* (1893), 23 O.R. 599, at p. 604; *Marrin v. Graver* (1885), 8 O.R. 39.

January 23. *Boyd, C.*:—The facts in this case are that the plaintiff rented the store part and the basement part of a block then under construction, and being completed, in December, 1906, at a rent of \$55 a month. The landlord was to put in electric light and gas and necessary fixtures for conducting a flour and feed business. The rent was not to begin till the tenant took possession. It was expected that possession would be taken about December 20th. The plaintiff's goods having come, the landlord allowed him to put some in No. 2 store, which was in the same block two doors from the store rented (which was No. 4). This was on January 15th, 1907; and other goods arriving were put in store No. 4, and plaintiff began making sales. He vacated both stores on February 3rd because his goods were being damaged by water coming through the roof on to the floor of the store. It appears that there were two storeys of the building above the ceiling of the ground flat rented by the plaintiff, and that the water came from or through the roof on account of a thaw, and also from a heavy rain. No complaint was made to the landlord—the plaintiff moved out and now sues for damages. In an examination of the plaintiff which was read to us on the appeal, but which was not in evidence before the learned Judge, the plaintiff said that before moving his goods into No. 4 he went to see the landlord to get his advice. I quote his words: "I asked him if it was safe to put the goods. There came a little thaw and the water came in, and I asked Mr. Ferguson if he thought it was advisable to put the goods in. Mr. Ferguson said, 'Certainly, put them in.' Well, I said, if there comes another thaw the goods

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would be damaged, and he said that would never happen again, 'You put the goods in.' I asked him if he would give me some planks to keep the bags off the floor so that if the water did come in they would be protected. He said, 'You don't want them; that will never happen again.' He says, 'You put your goods in and it will never happen again.'"

He says when he moved into No. 4 on January 15th the basement was nothing but water and ice. The store itself was oiled and varnished. All that was lacking was the shelving and light and heat.

He says any defects that were above the store before he moved in were plainly visible to the eye, and that he moved in with knowledge of these defects.

At the trial he said: "I saw the condition of the building before entering it . . . It was a new building and not completed when our bargain was made. I saw its condition when I made the bargain and before I went into possession, and especially saw the condition of the stores Nos. 2 and 4." This is all the material evidence going to the question as to the legal status of the plaintiff. What the precise defect was in the roof or elsewhere which caused the water to come from above upon the goods is not disclosed. But assume that it did come from an incomplete or a defectively constructed roof, I fail to find upon the state of the law any right of redress against the landlord—he not having undertaken to do anything in the premises, and being under no implied obligation to secure the plaintiff from water by reason of the existing condition of the roof or the rest of the building (over the flat rented) owned by and in the legal possession of the proprietor. There is a great dearth of express decisions in English law upon this question. It was adverted to thus by Kelly, C.B., in *Carstairs v. Taylor* (1871), L.R. 6 Ex. 217, at p. 219: "It is unnecessary to consider whether, as between landlord and tenant, where the landlord is in possession of the upper floor, and the tenant of the lower, there is an implied contract by the landlord so to maintain the part of the premises in his possession as not to permit damage to happen to the tenant through any ordinary causes." Martin, B., in the same case, says, at p. 222: "I think that one who takes a floor in a house must be held to take the premises as they are, and cannot complain that the house was not constructed differently. Probably the defendant

was under a liability to use reasonable care in keeping the roof secure, but he cannot be held responsible for what no reasonable care and vigilance could have provided against."

If this dictum of Martin, B., be law, there is here no evidence of any lack of reasonable care on the part of the landlord. The tenant knew the condition of the building under construction, and appears to have taken chances as to the inflow of water from thaw or other natural causes. There is no evidence to shew that the landlord's attention was directed to any particular source of danger and requested to remedy it—nothing to shew that he was not careful in the construction or the maintenance of the roof: *Manchester Bonded Warehouse Co. v. Carr* (1880), 5 C.P.D. 507, at p. 511.

The effect of this dictum, as well as the whole subject in hand, is fully discussed in Charles' Law of Tenement Houses, 1889, at p. 121, and from p. 118 to p. 131, and the conclusion is maintained that there is no implied obligation on the landlord to repair the roof.

This subject was under review in *Betcher v. Hagell* (1905), 38 N.S.R. 517, before a bench of four Judges, and the decision as expressed by Russell, J., is thus given: "I think it may be taken to be absolutely settled that, even assuming the roof to have been retained under the control of the landlord, . . . there is no duty whatever upon him to repair. The duties of the landlord in such a case (*i.e.*, one of an under flat) cannot rest upon any implied covenant, for there is no such covenant implied in the demise of such a property, whatever may be in the case of a demise of a furnished house. The duty of the owner is simply *sic uti suo ut alienum non laedat*, which maxim, as Sergeant Williams says, . . . does not apply to omissions, but "almost always applies to some act which is done by one man to the prejudice of another": p. 523.

In an earlier Manitoba report, *Rogers v. Sorell* (1903), 14 Man. R. 450, at p. 457, Killam, C.J., giving the judgment of a bench of three, reaches the same result, and rules that 'a tenant taking part of a building, in other parts of which are defects likely to result in damage to him, should examine the premises and contract for the removal of such (defects) as are apparent,' otherwise he will have no remedies afterwards against the landlord for damages caused by such defects. Both these decisions are in their facts like the circumstances of this case. After the full examination of the law and the cases in these two reports, it is a work of supereroga-

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tion to traverse the same course. The conclusions reached appear to be on satisfactory grounds, and are not in conflict with any English authority.

In *Lane v. Cox*, [1897] 1 Q.B. 415, at p. 417, it is held that a landlord who left a house in a dangerous or unsafe state incurs no liability to a tenant for any accident which might happen during the term unless he has contracted to keep the house in repair. The condition of the house is the subject of the contract, and the obligation of the landlord is to be measured by the contractual relation. That is a legal principle which applies to the present case. The plaintiff saw the condition and was aware, or could have been aware, of the state of the roof before he went in, and knowing that the premises were more or less leaky from some cause, whether from climatic reasons or from imperfect construction of the roof, he chooses to enter and must accept the consequences.

No case of negligence is made out either in the pleadings or the evidence. Altogether I can see no reason to disturb the judgment and it should be affirmed with costs.

A. H. F. L.

[IN CHAMBERS.]

WHITEMAN V. THE HAMILTON STEEL AND IRON COMPANY.

1908

March 23.

Court of Appeal—Security for Costs—Application to Dispense with—Poverty of Applicant—O. J. Act, sec. 76, Con. Rule 826.

Section 76 (c) of the O.J. Act, as enacted by 4 Edw. VII. ch. 11, sec. 2 (O.)—Con. Rule 826 being to the same effect—provides that, subject to rules of Court, on appeal from a Divisional Court, . . . security, unless otherwise ordered by the Court of Appeal, shall be given for the costs of appeal. In an action for damages under the Fatal Injuries Act, the trial Judge, being of opinion that there was no evidence to submit to the jury, dismissed the action; but directed the jury to assess the damages (which they did at \$3,500) in case it should be held on appeal that there was such evidence; and on appeal to a Divisional Court the trial Judge's finding was affirmed. An application to a Judge of the Court of Appeal, on the ground of the alleged poverty of the appellant, to dispense with or reduce the amount of security for costs of an appeal to the Court of Appeal, was, under the circumstances, refused.

THIS was an application on behalf of the plaintiff to dispense with security for costs on appeal from a judgment of a Divisional Court affirming the judgment entered at the trial dismissing the action.

The application was heard before Moss, C.J.O., in Chambers, on March 8th, 1908.

A. M. Lewis, for the applicant.

W. L. Ross, contra.

March 23. Moss, C.J.O.:—The action is for the recovery of damages under the Fatal Injuries Act for the death of the plaintiff's husband, caused, as she alleges, through the defendants' negligence.

At the trial before the Chief Justice of the King's Bench and a jury, he was of opinion that the plaintiff had not made out a case to submit to the jury, but he left it to the jury to assess the damages, on the understanding and agreement that if an Appellate Court should be of the opinion that there was any evidence proper to be submitted to the jury on the question of negligence judgment should pass for the amount of the damages. The jury assessed the damages at \$3,500, and judgment was entered dismissing the action.

The plaintiff appealed to a Divisional Court, which sustained the judgment.

I have read the pleadings, the evidence, and the judgment of the Divisional Court, as well as the plaintiff's affidavit in support

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of this application. The ground stated is that by the death of her husband she has been left a widow with eight children, the eldest being sixteen years and the youngest two years of age, and that she is without means and in destitute circumstances. She is at present residing in Detroit with her brother, but says that it is her intention shortly to return to the city of Hamilton, where she formerly resided.

No doubt, as stated in the judgment of the Divisional Court, the case of the plaintiff is a sad and hard one, and, as the learned trial Judge observed, every one must sympathize with her.

But the defendants' position must be considered. They have already been subjected to a trial and an appeal to a Divisional Court, and have been successful on both occasions. They were awarded costs at the trial, but I understand did not press for them, and they did not ask for and were not awarded costs in the Divisional Court.

At all events the plaintiff's affidavit makes it plain that even if they were in a position to seek to recover costs there is no prospect of succeeding.

It is now sought to subject them to a further appeal without giving them any safeguard as to the costs in the event of the appeal proving unsuccessful.

Section 76 (c) of the Judicature Act, as enacted by 4 Edw. VII. ch. 11, sec. 2, provides that subject to rules of Court, on appeals from a Divisional Court . . . security, unless otherwise ordered by the Court of Appeal, shall be given for the costs of the appeal. Rule 826 is to the same effect.

I agree with what was said by Maclellan, J.A., in *Thuresson v. Thuresson* (1899), 18 P.R. 414, at p. 416: "The intention of the law is that when a party has once got a judgment in his favour his right to it shall not, in general, be further agitated without his being made secure against the costs of the appeal; and it is only when the solvency of the intending appellant is doubtful that security is needful or useful."

To compel the defendants to defend themselves for the third time at their own cost is to inflict upon them a hardship for which no good reason suggests itself.

It was suggested that in any case the amount of security ought to be reduced, but I do not think I should accede to this.

The plaintiff has had the benefit of the judgment of two tribunals upon the merits of her case, and if she wishes to further prosecute the matter it is only fair to the defendants that their costs should be secured in the ordinary way.

I do not desire to express any opinion as to the merits, further than to say that as at present advised I see nothing in the judgment pronounced by the Divisional Court that ought to influence me to depart from the ordinary rule. Beyond this I have formed no opinion.

The motion must be refused. I presume the defendants will not ask for costs if the matter stops here.

G. F. H.

[DIVISIONAL COURT.]

SHEPPARD V. CANADIAN PACIFIC R.W. Co.

Railways—Carriage of Goods—Loss of Boxes Shipped—Condition of Contract—Necessity for Notice of Loss.

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Jan. 28.

One of the conditions of a railway way-bill was that there shall be "no claim for damage for loss of or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost or delivered."

Two boxes of blankets shipped by the plaintiff were re-shipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was "one box short":—

Held, that under the terms of the condition the box could not be said to be "lost," and notice in writing by the plaintiff to the defendants, within the thirty-six hours of the receipt of the advice note of the loss of the box, was not essential to entitle the plaintiff to recover its value.

THIS was an appeal from the District Court of the district of Nipissing.

The junior Judge of that district, before whom the action was tried upon a statement of the facts agreed upon by counsel, came to the conclusion that the appellant's action failed, and dismissed it.

On January 27th, 1908, the appeal was heard before MEREDITH, C.J. C. P., ANGLIN, and MABEE, JJ.

W. E. Middleton, K.C., for plaintiff, appellant.

White, K.C., for defendants, respondents.

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January 28. The judgment of the Court was delivered by MEREDITH, C.J.:—The plaintiff sues to recover the value of a box of blankets which was delivered by him to the respondents to be carried from Webwood in the Algoma District, to Norwich, in the United States. When the goods reached Iberville, near the frontier,—they went in bond,—a difficulty arose about taking them across the line, and in the end by direction of the appellant they were shipped back in bond over the respondents' line to the point of original shipment, and were taken out of bond by the appellant, at Sudbury.

The date when the goods reached Webwood, or such of them as did reach that point, is uncertain. It is stated on the advice note to have been about the 9th November, but nothing very much turns upon that.

The goods apparently were accompanied by a way-bill, and upon the arrival of such of them as did arrive at Webwood, an advice note was sent by the respondents to the appellant, which set out that the goods were billed from Iberville, and that they consisted of two boxes of blankets, and there is a charge for advanced freight and customs, making in all \$10.73; and at the foot there is a memorandum in these words, "Box short."

In point of fact, as I have said, only one box arrived at that time.

According to the statement of facts, the appellant when he received the goods which came informed the agent of the respondents of what the contents of the box consisted and the value of them; but no written notice was given within 36 hours of the delivery of the box that was delivered of any claim in respect of the other box. These are, I think, the material facts which appeared before the learned Judge of the district court.

The respondents rely upon the twelfth condition, it being admitted that a receipt was given for the goods in the terms of a blank form which was put in, and these conditions, it is also shewn, have been approved by the Dominion Board of Railway Commissioners. The twelfth condition provides that "There shall be no claim for damage, for loss of, or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage or detention, are given to the station freight agent at or nearest to the

place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portions of them as are not lost are delivered."

It will be observed that the language, as far as applicable to the case with which we are dealing, is "loss," "lost," "damage for loss of," "such of them as are not lost"—and the question is whether these goods were within the meaning of this condition lost, so as to require the appellant within 36 hours after the goods that arrived were delivered to him, to give notice in writing of his loss.

We are of opinion that the condition does not apply in the circumstances of this case. Putting it at the highest in favour of the respondents, there was no statement that the other package was lost, and it would appear not an unreasonable inference, having regard to the memorandum upon the advice note, that the goods were not lost, that this was an explanation that the goods had not arrived, that the other box had not come with the box that came at that time, but there was nothing to indicate that it was lost, and nothing to indicate that it was not on its way and would not be delivered at a later time.

If the contention of the respondents as to the effect of the condition is right, it would mean that whenever a consignee receives an advice note with regard to ten, twenty, fifty or one hundred boxes of goods, and only part of them come in the car or by the train the arrival of which leads to the giving of the advice note, the consignee would be bound at the risk of losing his remedy, in the event of it turning out that the goods were lost, to give the notice within 36 hours. That would seem to be an unreasonable state of things, and one that would put business men and the railway company to a great deal of trouble; and bearing in mind the rule that these conditions are to be construed strictly, and, where there is doubt, to be construed against the railway company—the persons claiming the benefit of them—we think that the words of this condition do not apply to the goods which are the subject of the claim.

Further questions were raised, one as to the validity of this condition, but in the view we have taken it is not necessary to determine it.

In the case of *Hayward v. Canadian Northern R.W. Co.* (1906), 4 W.L.R. 299, it was held by the full court of King's Bench of Manitoba, that the approval of the Railway Commission of a condition

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prevented the application of sec. 214 of the Railway Act, 1903, 3 Edw. VII., ch. 58 (D), which provides that "Every person aggrieved by any neglect or refusal in the premises shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servants."

Speaking for myself, and assuming that the case is intended to apply to a condition which in terms restricts the liability of the railway company, I should desire further consideration before I adopted it as being a correct statement of the law.

The result is that the appeal is allowed and the judgment below is reversed, and there will be substituted for it judgment for the plaintiff for the value of the goods with costs, and the appellant will have the costs here and below.

I may mention that this case comes up most irregularly from the district court. The pleadings and proceedings are not certified, as required by the Act. A number of papers are here without any marks upon them shewing that they were filed as exhibits. There is in the admitted statement of facts a statement that six exhibits were put in at the trial, but nothing appears to shew what they were, and one is left to find it out from an examination of the documents. I think the attention of the Inspector should be called to this, in order that the local officer may be informed of his failure to comply with the Rules of Court and the provisions of the statute.

G. F. H.

[ANGLIN, J.]

WHITLING V. FLEMING.

1908

March 27

Defamation—Words Imputing Unchastity—Absence of Averment and Proof of Special Damage—Restriction to Nominal Damages—Interlocutory Judgment—Assessment of Damages at Trial—Libel and Slander Act—Costs.

In an action, under sec. 5 of the Libel and Slander Act, R.S.O. 1897, ch. 68, for defamatory words spoken of a woman imputing unchastity to her, she "may recover nominal damages without averment or proof of special damage":—

Held, in the absence of such averment and proof, only nominal damages can be recovered.

In default of a defence in such an action, being one for pecuniary damages, under Con. Rule 589, only interlocutory judgment can be entered to fix liability, the damages, even though nominal, must be assessed by the jury at the trial, and the plaintiff is therefore entitled to the costs of such trial.

THIS was an action tried before ANGLIN, J., and a jury, at Walkerton on the 9th March, 1908.

D. Robertson, K.C., for the plaintiff.

O. E. Klein, for the defendant.

The plaintiff sued for slander imputing to her unchastity, bringing her action under sec. 5 of R.S.O. 1897, ch. 68.

At the trial the learned Judge reserved a motion on behalf of the defendant that the jury should be directed to assess nominal damages only, and submitted the case to the jury for assessment of damages as if they were at liberty to assess general and substantial damages. The defence of the defendant had been struck out by an order not appealed from, and interlocutory judgment against him had been signed. The case was entered merely for assessment of damages. The consent of counsel was obtained, that in the event of the learned Judge being of opinion that the plaintiff could only recover nominal damages he might enter judgment for her for the sum of one dollar for such damages. The learned Judge also reserved at the trial a motion of counsel for the defendant, that in the event of it being held that the plaintiff could recover only nominal damages, she should have no costs subsequent to the entry of interlocutory judgment, his contention being that in that case no assessment of damages was necessary.

Subsequently the learned Judge delivered the following judgment.

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March 27. ANGLIN, J.:—Section 5 of the Libel and Slander Act provides that in an action for defamatory words spoken of any woman imputing unchastity “the plaintiff may recover nominal damages without the averment or proof of special damage.”

The contention on behalf of the defendant is that this provision, in the absence of averment and proof of special damage, restricts the plaintiff’s right to nominal damages.

On behalf of the plaintiff it was urged that the effect of the statute is merely to make words imputing unchastity actionable without proof of special damage; and that therefore the effect of the statute is to entitle the plaintiff absolutely, upon the defendant being found guilty, to nominal damages, and if the jury, in their discretion, see fit, to award them, to enable her to recover general or substantial damages.

In my opinion the statute does not admit of the construction for which the plaintiff contends. The purpose of the legislation appears to have been, in cases in which the plaintiff could not prove special damage, to permit her to rehabilitate her character by the verdict of a jury. This purpose is fully accomplished by a verdict for nominal damages, and this, I think, was the full measure of the right intended to be conferred by the statute. To construe the statute otherwise is to give no significance whatever to the word “nominal.” If it were intended that the plaintiff’s right, without proof of special damage, should be to recover general or substantial damages, I can conceive of no reason why the word “nominal” was inserted.

The only reported case to which I have been referred bearing upon the matter is *Agar v. Escott* (1904), 8 O.L.R. 177. The plaintiffs in that case were a married man and an unmarried woman. The report shews that special damage was there alleged as to the male plaintiff, but not as to the woman. There is nothing to indicate that the words imputing unchastity were spoken of her in the way of her trade or calling. As to the woman, therefore, the only cause of action was under the section of the statute above referred to. The question before the Court was as to the right of the plaintiffs to plead a certain letter written by the defendant to the female plaintiff reiterating the charges against both, which had been published orally on other occasions. As to this letter it was pointed out that it afforded no cause of action to the woman, and that the

cause of action which it might give to the man, not being common to himself and the woman, could not properly be included in the action which they were allowed to bring jointly in respect of a slander published at the same time affecting both. The Court, however, took the view that this reiteration of a slander in a letter addressed to the woman might be given in evidence to aggravate damages, and therefore could be properly pleaded, if made use of only as a plea in aggravation. As to the man, the statute of course has no application. Upon proof of the publication of the defamatory words, and of the special damage alleged, he would, if no defence were made out, be entitled to a verdict for the amount of such special damage. It is perhaps conceivable that his damage might have been aggravated by the sending of the letter. As to the woman, it need only be said that the report of the decision makes it reasonably clear that although the paragraph appears to have been allowed to stand as an allegation on behalf of both plaintiffs for the purpose of aggravating damages, the question as to the extent to which the woman could recover damages was not brought to the attention of the Court. I therefore think the decision in *Agar v. Escott* cannot be regarded as establishing that in an action under the statute more than nominal damages may be recovered without averment and proof of special damage.

As to the other question, the practice appears to be quite clear. There is no provision in the rules entitling a plaintiff in an action for pecuniary damages, to sign anything but an interlocutory judgment for default of defence. A judgment awarding to the plaintiff nominal damages of any fixed sum and costs of action would be not an interlocutory judgment, but a final judgment. It is only in respect of liquidated claims that a final judgment for default is provided for: Rule 587. Where the claim is for pecuniary damages interlocutory judgment only can be signed: Rule 589. In order to obtain final judgment, the case must be set down for hearing at a Court for the trial of actions, in order that damages may be assessed. There is no provision in the Rules and no practice enabling a plaintiff in a slander action, who is entitled to an interlocutory judgment under Rule 589, even though the damages can in no event be other than nominal, to obtain a final judgment for such damages and costs without bringing the action down to

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trial for the assessment of damages. Rule 579 does not seem to apply: O.J. Act, sec. 102.

The effect of non-delivery of a statement of defence is to entitle the plaintiff only to a judgment concluding the issue as to liability. It does not, under the practice, entitle him to final judgment for damages without assessment. Upon a finding of guilt by a jury, without assessment of damages, the Court cannot, even with the plaintiff's consent, enter a judgment in his favour for nominal damages: *Wills v. Carman* (1888), 14 A.R. 656; and upon a finding that there are no damages, there being no finding as to liability, the verdict is inconclusive; neither party is entitled to judgment, and a new trial is necessary: *Bush v. McCormack* (1891), 20 O.R. 497.

Since, therefore, the plaintiff could not obtain final judgment for the nominal damages to which the statute entitled her and for her costs of the action without bringing this action down for assessment of damages at a Court for the trial of actions (Rule 589), it follows that she is entitled, as part of the costs of the action necessarily incurred by her, to the costs incurred in connection with the assessment of damages.

There will, therefore, be judgment for the plaintiff for the sum of one dollar for damages and for her costs of this action, including the costs of the assessment of damages had before me.

G. F. H.

[IN CHAMBERS.]

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Feb. 28.

Municipal Corporations—Quo Warranto Proceedings—Cross-examination on Affidavits—Master in Chambers—Powers of.

In proceedings instituted under the Con. Mun. Act, 1903, 3 Edw. VII. ch. 19 (O.), to unseat a member of a municipal council, the cross-examination of affiants on their affidavits can only be had on leave obtained therefor from the Judge or Master in Chambers or the officer before whom the proceedings are being carried on, who must take such cross-examination himself, no authority being conferred on him to direct any one else to do so.

THIS was an appeal by the defendant from the order of the Master in Chambers, dated the 18th of February, 1908, requiring that he and Emily Davis, affiants on his behalf, should attend before the local registrar of this court at Brampton to submit to cross-examination upon their affidavits filed in answer upon proceedings taken to unseat the defendant as a member of the Brampton town council.

Proceedings were instituted before the Master in Chambers under the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.).

Upon the matter coming before the Master, it was adjourned in order that the relators might consider whether or not they should take steps to cross-examine the defendant and Mrs. Davis. Without obtaining any direction in that behalf from the Master, the solicitor for the relators procured from the local registrar an appointment for the cross-examination of the affiants before him, proceeding under Consolidated Rules Nos. 490 and 492. This appointment was served upon the defendant and Mrs. Davis, and by advice of counsel they declined to submit to cross-examination pursuant to it.

The relators then moved before the Master in Chambers for an order requiring that the defendant and Emily Davis should attend at their own expense and submit to cross-examination upon their affidavits; or, in the alternative, requiring that they should attend before the Master in Chambers for oral examination before him, and that in default the affidavits should be removed from the files.

Upon this application the Master ordered that the defendant and Emily Davis should attend before the local registrar, at their

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own expense and without payment of further conduct money, and submit to cross-examination upon their affidavits.

From this order the defendant appealed.

On February 24th, 1908, the appeal was heard by ANGLIN, J., sitting in Chambers.

T. J. Blain, for the defendant.

W. E. Middleton, K.C., for the relators.

February 28. ANGLIN, J.:—The questions for consideration are whether Consolidated Rule 490 applies to proceedings under the Municipal Act to contest the validity of an election, and whether an affiant in such proceedings is liable to cross-examination before any other officer than the judicial officer by whom the matter is to be tried. It is not disputed by counsel for the defendant that the Master in Chambers might have directed that the affiants should attend and submit to cross-examination before himself; but he maintains that Rule 490 does not apply to these proceedings, that the appointment of the local registrar was issued without authority, and that the Master in Chambers has not power to direct the taking of oral evidence, whether original evidence or in the nature of cross-examination upon affidavit, before another officer.

Mr. Blain contended that rules passed in the 14th year of the reign of her late Majesty Queen Victoria, regulating proceedings in *quo warranto*, are still in force.

I am unable to accept that view. All rules of practice, save certain rules specially excepted, and not including these *quo warranto* rules, were expressly repealed by the Consolidated Rules of 1888 Rule 3. In the consolidation of 1888 there were a number of special rules governing proceedings in *quo warranto* matters, Nos. 1038 to 1044. These rules, however, did not provide the entire procedure. In fact, the main part of the procedure was then to be found in the Municipal Act, R.S.O. 1887, ch. 184, secs. 187 *et seq.* Section 197 of that statute contained provisions substantially the same as those now found in sec. 232 of the statute, 3 Edw. VII. ch. 19 (O.), which provides that "the Judge (*i.e.*, in this case, the Master in Chambers) shall, in a summary manner, without formal pleadings, hear and determine the validity of the election, and the right of any person to sit, and may inquire into the facts on affidavit

or affirmation, or by oral testimony . . . or by one or more of these means as he deems expedient."

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There are really two questions for determination: First, whether there is a right to cross-examine upon affidavits without leave; second, whether with leave the cross-examination may be had elsewhere than before the Master in Chambers or the Judge trying the case.

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In *Rex ex rel. Ross v. Taylor* (1902), 1 O.W.R. 265, Mr. Winchester, then Master in Chambers, held that it was a matter of discretion whether there should or should not be cross-examination upon affidavits in the proceedings under the Municipal Act; and in the exercise of his discretion he refused, in that case, to permit cross-examination.

Although the facts of the case of *Regina ex rel. Piddington v. Riddell* (1867), 4 P.R. 80, referred to by Mr. Winchester, were not at all the same as those of the case now under consideration, nor as those in *Rex ex rel. Ross v. Taylor*, the opinion of the former learned Master, whose experience in these matters was extensive, is entitled to very great respect.

Counsel for the relators relies much upon the comprehensive language in which Rule 490 is framed. He contends that this Rule extends to every motion or proceeding in court or chambers. But authority is not lacking to shew that Rules equally general in their terms do not apply to cases for which other procedure is provided.

In *Trethewey v. Trethewey* (1907), 10 O.W.R. 684, 893, it was held by a Divisional Court that notwithstanding the comprehensive language of Rule 491, permitting that "a party to an action or proceeding may require the attendance of a witness to be examined, before any officer having jurisdiction in the county where the witness resides, for the purpose of using his evidence upon any motion, petition, or other proceeding before the Court, or any Judge or judicial officer in Chambers," a party moving before a Divisional Court by way of appeal, although his application is "a motion or proceeding before the Court," may not without leave require the attendance of any witness to be examined in support of such motion. The view of the Court was that in regard to motions to a Divisional Court by way of appeal, Rule 498 makes provision which excludes

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the application to such a motion of Rule 491, notwithstanding the generality of its language.

In regard to proceedings in the Master's office, Rule 484 provides that evidence shall be given *vivâ voce* unless the Master otherwise directs. Rule 668 provides that witnesses may by direction of the Master be examined before a special examiner. Where an affidavit is permitted to be filed by direction of the Master, it has been held that, notwithstanding the generality of its language, Rule 490 does not permit the opposing party to cross-examine the affiant without the direction of the Master: *Plenderleith v. Parsons* (1905), 6 O.W.R. 145.

Having regard to the provisions of sec. 232 of the statute, I am of opinion that, notwithstanding the broad language of Rule 490, it should not be held applicable to proceedings to contest the validity of municipal elections. The cognate Rule 491 is not applicable. See sec. 222 of the statute. The provisions formerly contained in the Consolidated Rules of 1888, were repealed by the Rules of 1897, and the whole procedure relating to municipal elections was embodied in the sections of the Municipal Act of 1897, R.S.O. ch. 223, now found in the statute, 3 Edw. VII. ch. 19, secs. 219 (O.) *et seq.* These sections were, in my view, intended to provide a special code of procedure for these matters, and to the extent to which they provide machinery or regulate procedure, were intended to be comprehensive and exhaustive, and were designed to exclude the application of the general rules.

Section 244 of the statute makes provision for the framing of general rules, and provides that all existing rules shall remain in force until rescinded or altered.

It was strongly argued on behalf of the relators that the effect of this section was to render Rule 490 of the Consolidated Rules applicable, notwithstanding the language of sec. 232 of the statute. In my opinion, however, this contention is not well founded. The provision that all existing rules shall remain in force until rescinded was taken from the Revised Statutes of 1887, sec. 208, and manifestly referred to the special rules regulating procedure in *quo warranto* matters, then in force, and some of which were subsequently embodied in the Consolidated Rules of 1888. These rules have since been repealed, as has been already stated.

Section 232 of the statute, in my view, contemplates that what-

ever oral testimony is given, whether it be evidence of witnesses who have not made affidavits or cross-examination of affiants, should be taken before the judicial officer who is to determine the validity of the election. The statute contemplates that he should discharge the duties of a trial Judge. It is desirable that he should have the advantage, which a trial Judge generally has, of observing the witnesses testify, where they give oral evidence: Con. Rule 483. Section 232 provides for the disposition of these matters in a summary manner. The taking of evidence or of cross-examinations before an officer other than the judicial officer trying the matter, would involve the employment of a stenographer and the transcription of the notes of evidence. It was not intended, I think, that the parties should be subjected to this unnecessary expense. Then sec. 229 especially provides that where the matter is returnable before a Judge of the High Court, he may order the evidence to be used on the hearing to be taken *vivâ voce* before a county court Judge. The presence of this provision in the statute, restricted as it is to motions returnable before a Judge of the High Court, indicates that where a motion is returnable before the Master in Chambers, or a Judge of the county court, it was intended that all the oral evidence to be used on the hearing should be taken before the judicial officer trying the case. Cross-examination upon affidavit is, in my opinion, quite as much "oral testimony" as original evidence given by a witness orally examined.

For these reasons I think that there was no right on the part of the relators to issue an appointment for the cross-examination of the defendant and Emily Davis, without leave of the Master in Chambers first obtained; and I am further of opinion that the Master in Chambers has no authority to direct cross-examination of affiants to be taken before any other officer than himself.

The appeal will therefore be allowed, with costs here and below to the defendant in any event of these proceedings; and the order of the Master in Chambers will be varied by directing that the defendant and Emily Davis shall attend before the Master in Chambers at such time and place as he shall appoint, and submit to be cross-examined upon their affidavits.

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ROWLAND V. THE TOWN OF COLLINGWOOD.

March 26.

Intoxicating Liquors—Liquor License Act—Municipal Corporations—By-law Increasing License Fees—Effect of—Prohibition or Monopoly—Bona Fides.

Under 6 Edw. VII. ch. 47, sec. 10 (O.), amending the Liquor License Act, R.S.O. 1897, ch. 245, the license duties were increased, the duties imposed being, in cities of a population of over 100,000, \$1,200 for a tavern and \$1,000 for a shop license; in cities of a population of 10,000 only, and towns of over 5,000 and not more than 10,000, \$450 for a tavern and shop license respectively. By sec. 11, the council of any municipality, with the approval of the electors, could increase the above amounts; but by sub-sec. 5, where in cities there had been an increase made by the Act, no further increase should be made.

In a town with a population of about 7,000, the council, with the electors' approval, passed a by-law increasing the amount to be paid for a tavern license to \$2,500:—

Held, that the validity of the by-law was dependent on the good faith of the council in passing it, and it being apparent that the object was not with regard to the continuance of the business, but either to altogether prohibit it, or to so restrict it as to create a monopoly, the by-law was bad, and must be quashed.

THIS was an application to quash by-law No. 698, passed on the 22nd January, 1908, by the municipal council of the town of Collingwood, to increase the duties to be paid for tavern and and shop licenses for the town to the sum of \$2,500.

The application was heard before BRITTON, J., sitting in the Weekly Court, on March 23rd, 1908.

J. Haverson, K.C., and *G. W. Bruce*, for the applicants.

J. Birnie, K.C., for the defendants.

MARCH 26. BRITTON, J.:—The main ground of objection, and the only one that requires consideration, is that this by-law is *ultra vires* of the said municipal council, in that the same was not passed in the *bonâ fide* exercise of the powers of the council, but in order to prohibit the issue of tavern and shop licenses in the said municipality.

The Act to amend the liquor license laws, 6 Edw. VII. ch. 47, sec. 10 (O.), creates new fees for tavern and shop licenses in the Province of Ontario. These fees are called license duties. In a city having a population of more than 100,000 the duty for a tavern license shall be \$1,200, and for a shop license shall be \$1,000.

In a city having a population of 10,000 only, and a town having a population of more than 5,000 and not more than 10,000, the duty for a tavern license shall be \$450 and for a shop license \$450.

The town of Collingwood has a population of about 7,400.

Section 11 provides that the council of any municipality may by by-law increase the duties to be paid for tavern or shop licenses beyond the amount provided in the Act, but the by-law must be approved by the electors.

Sub-section 5 of sec. 11 provides, however, that in any city where an increase is made by the Act, no further increase shall be made by the council under this sec. 11.

The result of this legislation is that in a city like Toronto, with over 100,000, the duty of \$1,200 for an hotel cannot be increased, but in a town like Collingwood the duty can be increased over the amount fixed by statute at \$450, and, if the council is correct, this duty can be placed at \$2,500, and even at any larger amount.

The test of the validity of the by-law in question must depend upon the good faith of the council in passing it. If it was passed in the *bonâ fide* exercise of the power given to the council, the by-law should stand, notwithstanding the apparent unfairness of being allowed to have a tavern license in a city of 300,000 for \$1,200, and compelling a man, who wishes to keep a tavern in an outlying town to pay the sum of \$2,500, or even a larger sum, for the privilege.

There is no technicality about this; it is the broad question on its merits.

To determine this question of *bona fides*, I must look: (1) At the object the Legislature had in view in this legislation; (2) the powers and duty of the council under it; and (3) the circumstances under which, and how and why, the council passed the by-law.

It was not intended by the Legislature that local prohibition should be brought about in this way. There is special provision in what are called the "local option" clauses for getting prohibition by by-law, if the electors desire it; but the Act requires that three-fifths of the electors voting upon said by-law must approve of it before it can be finally passed.

If this by-law, in fact, prohibits, then what was intended to

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be brought about in a certain definite way, and to be approved of by three-fifths of the electors, can be accomplished in an entirely different way, and subject to the approval of only a majority of the electors. That may be quite right. I can only repeat that, in my opinion, that was not the intention of the Act.

The power and duty of the council was not to prohibit, but to permit and regulate the selling, and to provide for certain increased duties to be paid for the privilege; not to fix a sum as duty, so-called, but which would not be paid. If, for any reason in the by-law itself, it does not permit the business of tavern-keeping to be carried on in a place not under local prohibition, upon the condition of paying a duty and obeying regulations and acting within restrictions lawfully imposed, then the provincial law under which the municipal by-law was passed is being evaded and not properly regarded by the members of the municipal council.

The material circumstances which led to the passing of this by-law are not in dispute. A local option by-law was submitted in Collingwood on 7th January, 1907, and, although it came close to being carried, lacked the necessary three-fifths of the electors, and was defeated. In April, 1907, a public meeting was held in Collingwood, in the interest of temperance reform, and a letter, signed by the chairman and secretary of that meeting, was sent to the council asking to have a by-law submitted to the electors fixing the license fee at \$25,000 for the year from 1st May, 1908. Some of the supporters of that request stated their object to be prohibition. Such a by-law was introduced. The solicitor's opinion was publicly read that such a by-law would be *ultra vires*. He may not have been right, but, if right, it does not necessarily follow that the present by-law is bad for want of authority in the council to pass it. Such a by-law was introduced, passed first and second readings, but was not submitted to the electors. Later on a request was made by the Citizens' Temperance League that the by-law be changed from \$25,000 to \$2,500, and the by-law in question was introduced and passed, and was approved by the majority of the electors of Collingwood on the 5th January, 1908. The campaign was one for prohibition. It was said by one of the members of the council for 1907, in substance, that it was not a question of getting money from the hotel-keepers, but that they wanted to cut out the business altogether. A

procession was formed previous to the voting, in which banners were carried, and on one of these the words, "Abolish the bars," were displayed. All such may be quite right on occasion, but the by-law was not such as the statute intended for a prohibition campaign.

It is said, in answer to this application:—

(1) That there was no intention to prohibit.

That is a question of fact. It may not have been the intention of all the members of the council, but it was of some, and that, in my opinion, would be the necessary result, unless one person who, in command of sufficient means, would try the experiment of paying the large fee in the hope of making it up by the monopoly created. No one denies that the intention, if not to prohibit, was to reduce the number of persons who would or could obtain the license.

(2) The result cannot with absolute certainty be foretold; therefore, the application to quash should fail.

The answer is that upon the material before me the result will be either no license or monopoly, and in either case there is want of power to pass it; and, whatever may be the actual result, the fact remains that there was want of good faith. The by-law was passed without regard to continuing the business of hotel-keeping in Collingwood, no matter how those engaged in the business might be affected.

The duty of members of the municipal council, under the Municipal Act, is to faithfully and impartially, and to the best of their knowledge and ability, execute their office of councillors. Sale of liquor under license is a lawful business, and those engaged in it have their rights. The minority have their rights, and it is as much the duty of the municipal council to protect the rights of the minority as to carry out the wishes of the majority.

The amount of the duty imposed by the law is of itself the strongest evidence of want of *bona fides*. The Liquor Act is now, as consolidated, the result of years of experiment and a careful watching of the trade, and of dealing with offenders of all sorts against the Act, and against rules and regulations as to places where liquor is sold. This Act has fixed \$450 for Collingwood; \$1,200 for the largest of our cities. If \$450 is not enough for Collingwood, *primâ facie*, some amount between \$450 and

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\$1,200 would be reasonable; but, instead of that, the highest fee for tavern license known in the world, so far as presented to me in the argument, was fixed.

That is evidence of some ulterior motive than merely to carry out the Liquor License Act.

I do not cite as authority American cases, but there are those where the reasoning commends itself to me, and quite supports the view I have taken.

There are Canadian cases in point.

In re Barclay and Township of Darlington (1854), 12 U.C.R. 86, the municipality of the township of Darlington passed a by-law enacting that the number of taverns which should receive license to sell wine and spirituous liquors in the municipality should not exceed one. The statute 13 & 14 Vict. ch. 65 gave power to the municipality of each township "to make by-laws for limiting the number of inns or houses of public entertainment in such township, for which licenses to retail spirituous liquors to be drunk therein shall be issued."

It was held by Chief Justice Robinson that this by-law was bad, as amounting, in effect, to a total prohibition, and, therefore, an attempt to evade the provisions of 16 Vict. ch. 184, sec. 4, by which no such by-law can be passed without the assent of a majority of the electors.

I quote from the judgment in that case, at p. 91:—

"We are of opinion that this by-law must be regarded as an intended evasion of the provision in the fourth clause of the provincial statute 16 Vict. ch. 184; and nothing can shew that more clearly than the fact, which is sworn to and not denied—that two weeks before this by-law had passed, a draft of a by-law for prohibiting absolutely the selling of spirituous liquors by retail within the municipality was proposed to the electors at a public meeting, and was not adopted or approved of. Then a few days after the municipal council passed this by-law, prohibiting all licensed taverns but one, and no care was taken that this one should not be situated in a remote corner of the township. We cannot look upon this as anything else than a contrivance by the municipal council to do that indirectly which they found they could not accomplish directly and in the manner required by the Legislature. It was not a *bonâ fide* exercise of the dis-

cretion of limiting the number of licensed taverns, with a view to the reasonable and convenient accommodation, and, so far as could be managed, the *equal* accommodation of the inhabitants of the township. It was, in reality, a prohibitory measure as to its general effect and tendency, and was intended to give the go-by to a legislative enactment which gave to the inhabitants of the township a direct voice upon the question of prohibition. It may naturally be objected to this view, that the by-law complained of is literally nothing but a by-law limiting the number of taverns, and that is true; but taken with reference to the subject as it applies, and to the whole municipality, it is in its effect a prohibitory by-law, and we can have no doubt was passed in that spirit. To desire to establish such a prohibition may be a laudable desire, prompted by good and wise motives, and it might be well, perhaps, for the township of Darlington, and for all other townships, if an absolute prohibition against selling intoxicating liquors in taverns or houses of public entertainment were established. That is a question upon which public opinion is divided, and which we are not in any manner called upon to decide. . . .

"It may be asked, if we hold that a by-law allowing but of one licensed tavern in a township be illegal, as not being a reasonable exercise of the discretion given to limit the number of such taverns, whether the municipal council could legally limit the number to twenty, or ten, or two, and where the line is to be drawn; and no doubt this is a pertinent and reasonable question, and one of such a nature as makes it a matter difficult and delicate to answer.

"The best, and, perhaps, the only, answer we can give, is that the tribunals of the country, to whom jurisdiction is given in this respect, must be relied upon for exercising a just and sound discretion. It will not often be found difficult to draw the line, and it may be safely assumed that wherever there is fair ground of doubt, which we think there is not in this case, the inclination will always be to let the by-law operate, and leave it to the Legislature to interpose, if they see a necessity."

Using the facts in the present case, and applying the present law, instead of the facts and law of 1854, when Sir John Robinson gave the judgment quoted from, I find myself forced to a similar

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conclusion in regard to the by-law now attacked: see also *Grey-stock v. Otonabee* (1855), 12 U.C.R. 458.

In *In re Talbot and City of Peterborough* (1906), 12 O.L.R. 358, it was held by MacMahon, J., "that a by-law of a municipal corporation imposing a license fee of \$200 on the sale of cigarettes in stores and shops, purporting to be passed under sec. 583, subsecs. 28, 29, of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), was *ultra vires*, as, in effect prohibitive, and not merely regulative, the evidence shewing that it exceeded the annual profits which any shop in the municipality could make on the sale of cigarettes."

The case of *Re Brodie and Town of Bowmanville* (1876), 38 U.C.R. 580, is to the same effect, and the clear reasoning of Harrison, C.J., in giving his judgment, compels the conclusion at which I have arrived.

It was argued that this was a legitimate thing for the council to do, if looked at merely for the purpose of raising a revenue.

It is quite true that, in the final distribution, the town would get one-half of any balance of the particular license fund, after deducting salary and expenses of inspector, and for expenses of the office of the board and of officers, etc., but it appears plainly enough that this by-law was not enacted in the hope or expectation of any increase of revenue.

Even if the majority of the electors approve, it is a by-law of the council, and if tainted, as in my opinion it was, by improper motives at the beginning and in passing it, it cannot be made good by a majority of the electors sanctioning it.

The by-law should be quashed, with costs.

G. F. H.

[DIVISIONAL COURT.]

WEBB v. ROBERTS.

*Sale of Land—Misrepresentations—Rescission—Affirmation by Purchaser
After Knowledge—Occupation Rent—Judgment.*

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The defendant bought a house and lot from the plaintiff for \$1,400, purchase money to be payable by instalments of \$10 a month. The contract further provided that unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although before paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fourth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money paid, and in the alternative damages for the misrepresentations:—

Held, that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and that the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount which he had paid, less a proper occupation rent.

THIS was an appeal by the plaintiff from the judgment of RIDDELL, J., in this action, where the facts are fully set out.

The action was tried on November 13th, 1907, at the non-jury sittings at Toronto.

J. B. Clarke, K.C., and C. Swabey, for the plaintiff.

A. J. Anderson, for the defendant.

December 4. RIDDELL, J.:—The plaintiff, with some assistance, had, in the vicinity of Toronto, built a cottage, himself apparently the carpenter. The wife of the defendant (an Englishman who had been in this country but a short time) seeing an advertisement in an evening paper of this cottage for sale, and thinking that it would answer the requirements of her husband and herself, went to the plaintiff about it. The plaintiff represented to the defendant's wife, and afterwards to the defendant and his wife together, that the house was a well-built house, built after the old English style, and "not jacked up like houses in this country;" that it was of good workmanship and double-boarded on the outside; and warm and comfortable. He added that

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the place was "a regular little Eden." He told them, also, that they might trust a brother Englishman. Some statements were made as to the title, which I do not think it necessary to set out. Although the wife did make a casual inspection of the property, it is apparent, and I find as a fact, that the contract was entered into upon the strength of the plaintiff's representations. The very assurance that they might trust a fellow countryman, instead of acting as a danger signal, as it would to those more experienced in the world's ways, seems to have prevented the defendant and his wife having suspicions.

A written contract was entered into, April 22nd, 1907, between the plaintiff and defendant for sale of the property for \$1,400—\$175 in cash, and \$10 on the 22nd day of each month until May 22nd, 1917, and \$15 on June 22nd, 1917, interest on unpaid portion of purchase money to be paid quarterly on every 22nd day of July, October, January, and April, until the whole should be paid. Possession was to be given at once, and as soon as the purchase money and interest should be paid the plaintiff was to convey the property. It was further provided that time should be of the essence of the agreement, and unless the amounts should be punctually paid, all payments made should be forfeited and all rights of the defendant should cease and determine, and the plaintiff be at liberty to enter and lease or sell without accounting to the defendant, but that such entry or lease or re-sale should not impair the rights of the plaintiff to enforce the covenant for payment.

The defendant made the down payment of \$175, and took possession of his purchase. He soon found that it was not at all what he had been led to believe. It was not well built—I have no evidence as to what was meant by "old English style," but clearly the parties understood by that something better than our modern Canadian style—and the fact is that the house was not better, but, if anything, worse, than the ordinary Canadian house of the kind, and it was "jacked-up"; the workmanship was not good (the plaintiff seems to have been an amateur carpenter); the house was not double-boarded on the outside; and it was not warm and comfortable. The representation that the place was a "regular little Eden" was, of course, the merest puffing, and I lay no stress on it, even if it were not the case that what

constitutes an Eden is so very much a matter of individual opinion. All these defects became apparent from time to time, but the defendant, instead of throwing up his purchase, went on and paid the instalments due May 22, \$10, June 22, \$15, and July 22, \$10, and interest, \$18. Before this last-mentioned day the defendant and his wife were aware of all the faults of the house and of the falsity of all the misrepresentations of the plaintiff. On that day, upon paying the plaintiff the instalment of principal and interest, he (the plaintiff) was told that the house was not double-boarded on the outside, and he said that if they used felt paper the defect could be remedied. The defendant paid the instalment, having made up his mind to take his chance of the remedy suggested by the plaintiff being effective. It did not so prove; the defendant changed his mind, and on the 22nd of August coming round, he refused to pay the instalment then due, but continued to hold possession, lest he should lose the money he had paid, including the \$20 or \$30 he had put on in repairs.

This action was brought September 5th, setting out the agreement and the payment by the defendant, but adding that when the instalment became due on August 22nd, "the defendant neglected and refused . . . to pay the same, whereby all the said payments made by the defendant . . . became forfeited to the plaintiff . . . and the plaintiff became and is entitled to . . . take possession . . . but the defendant refuses to deliver up possession . . ." And the plaintiff claims possession, \$15 a month for use and occupation since July 22nd, and general relief. The defendant pleads misrepresentation and fraud on the part of the plaintiff, and claims rescission of the agreement, return of his purchase money, and general relief.

At the trial (the defendant still insisting upon and retaining possession), I found the facts I have already set out and others, and these findings may be referred to.

Had it not been for the conduct of the defendant continuing his payments and his occupation after becoming fully aware of the falsity of the representations made to him to induce—and which did induce—him to execute this contract, there can be no doubt that he would have been entitled to rescission. "Where representations are made with respect to the nature and character

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of property which is to become the subject of purchase affecting the value of that property, and these representations afterwards turn out to be incorrect and false, to the knowledge of the party making them, a foundation is laid for maintaining an action in a court of common law to recover damages for the deceit so practised; and in a court of equity a foundation is laid for setting aside the contract which was founded upon that basis": Lord Lyndhurst in *Attwood v. Small* (1835), 6 Cl. & F. 232, at p. 395; *Directors of the Central R.W. Co. of Venezuela v. Kisch* (1867), L.R. 2 H.L. 99, at p. 121. I find fraud in all the representations made, except that as to the house being warm and comfortable. In this case the delay would not deprive the defendant of his right to rescind: *Erlanger v. New Sombrero Phosphate Co.* (1878), 3 App. Cas. 1218; *Clough v. London and North-Western R.W. Co.* (1871), L.R. 7 Ex. 26; *Morrison v. The Universal Marine Ins. Co.* (1873), L.R. 8 Ex. 197.

The plaintiff, however, contends that, with a full knowledge of all the facts, the defendant elected to affirm the contract, manifesting this election by paying the instalment due July 22, and going on repairing and "fixing-up" the house in a manner which he thought would result in making it satisfactory. If a party, "knowing of the fraud," elects "to treat the transaction as a contract, he" loses "his right of rescinding it": *Campbell v. Fleming* (1834), 1 Ad. & E. 40, at p. 42; and the discovery of a new ground for rescission does not revive this right so lost: S.C. at same page; *Walton v. Simpson* (1884), 6 O.R. 213. So that, even if it should be considered that the representation that the house was warm and comfortable had not, on the 22nd July, been demonstrated to the defendant as being false, he would not, upon this being proved, acquire a new right to rescind if it had once gone. Moreover, I do not find that the last-mentioned representation was, in fact, fraudulent, though I do find it was a mistake. And an innocent misrepresentation, as I think this was, would not be a ground for rescission: *Shurie v. White* (1906), 12 O.L.R. 54, and cases cited; see especially p. 60.

I cannot look upon the acts of the defendant in paying the instalment due on July 22nd, 1907, and continuing in the house and repairing it to suit himself, as anything other than unequivocal acts of ratification, adoption or confirmation of the

voidable contract. The rule as to what is necessary in order that there shall be a ratification of a contract procured by fraud and the like is laid down in several ways. "You must have full knowledge of your rights when you execute the act of confirmation": *Sandeman v. MacKenzie* (1861), 30 L.J. Ch. 838, at p. 842. "A waiver must be an intentional act with knowledge": *Earl of Darnley v. London, Chatham and Dover R.W. Co.* (1867), 36 L.J. Ch. 404. There must "be full knowledge of all the facts, full knowledge of the equitable rights arising out of those facts, and an absolute release from the undue influence by means of which the frauds were practised": *Moxon v. Payne* (1873), L.R. 8 Ch. 881, at p. 885. "In equity it is considered, as good sense requires it should be, that no man can be held by any act of his to confirm a title, unless he was fully aware at the time, not only of the facts upon which the defect of title depends, but of the consequence in point of law": *Cockerell v. Cholmeley* (1830), 1 Russ. & M. 418, at p. 425. "To have any effect or validity . . . it must be shewn that the party was fully acquainted with his rights, that he knew the transaction to be impeachable which he was about to confirm; and with this knowledge and under no influence he freely and spontaneously executed the deed": *Dunbar v. Tredennick* (1813), 2 Ball & B. 304, at p. 317. "He must be aware that the act he is doing is to have the effect of confirming an impeachable transaction": *Murray v. Palmer* (1805), 2 Sch. & Lef. 474, at p. 486. This last statement cannot, I think, be supported to the full extent in every case.

But applying any of these tests, except the last, as I have said, I cannot consider what was done by the defendant as anything but unequivocal acts of ratification—adoption—of the contract. While I think the defendant knew his rights and intended to abide by and adopt the contract when he paid, I do not find that he knew that his acts would have the effect of so ratifying the contract that he must abide by it. This is, in my judgment, not necessary.

The case of *Barnard v. Riendeau* (1901), 31 S.C.R. 234, is quite different. There the defendant repudiated the contract, and though he remained in possession, it was only while awaiting the pronouncement by the Court upon the matter of difference. Here there was no repudiation, but, on the contrary, as I think, a com-

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plete ratification by the defendant, with full knowledge and intending to ratify. That he afterwards changed his mind makes his case no stronger than it was on July 22nd and when going on with his repairs. I think, therefore, the contract is binding, and is not to be rescinded.

That decision does not, however, dispose of the case. A common law action lies for deceit inducing anyone to enter into a contract, and may be pursued though the contract is not—or cannot be—rescinded. Here there was deceit inducing a contract, and the defendant is entitled to such damages as he can shew resulted from his entering into this contract. By entering into the contract he has been induced to pay certain sums of money to the plaintiff. Not having carried out his contract, he cannot claim the difference in value between the property as it should have been and as it is; he has disabled himself from taking that remedy. And the contract provides that money paid thereunder shall be forfeited, and so cannot be recovered back by an action on the contract. But why should damages not be given to the defendant for being induced to enter into such a contract? I do not see any reason. *Pearson and Son v. Dublin Corporation*, [1907] A.C. 351, is the latest case in which an action for deceit has been considered where the deceit has induced a contract. The judgments of the law Lords are most instructive. There the contract was binding, but that did not bar an action of damages. The damages are the amount of money he has paid less the value he has had under the contract—that is, the value of the property for occupation purposes. That I fix at \$10 per month for the time the defendant was in possession. (I am informed that he has now given up possession.) Except by consent, I can deal with this value only up to the time of the trial; but if both parties consent, I fix the same amount during the whole period of the defendant's occupancy. The plaintiff, being under the contract entitled to retain the money paid, and the defendant to recover the same amount back for damages for deceit, together with the amount, \$20, paid by him for repairs, less the value he has received for the occupation of the property, the result is the same as though it should be ordered that the plaintiff return the amount paid him less rent at \$10 per month, the sum of \$20 being allowed on the rent.

The result financially is the same as though the defendant had succeeded upon the claim for rescission. And had I thought that that claim should succeed, I should have given no costs to either party. And in the result I have arrived at, I think no costs should be given.

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This appeal was argued on January 21st, 1908, before BOYD, C., ANGLIN and MABEE, JJ.

J. B. Clarke, K.C., for the plaintiff, contended that the defendant's right to receive the money he had paid was lost by reason of the contract, which provided for forfeiture; that when the fraud was discovered, the defendant might have repudiated the contract and recovered his money; that the defendant could not recover general damages until he had acquired title and paid his purchase money, and that then the measure of damages was the difference between the price and the true value; or that the defendant might bring his action for special damage, of which, however, there was here no evidence: *Church v. Abell* (1877), 1 S.C.R. 442; *Frye v. Milligan* (1885), 10 O.R. 509; *Tomlinson v. Morris* (1886), 12 O.R. 311.

A. J. Anderson, for the defendant, referred to *Barnard v. Riendeau*, 31 S.C.R. 234, and other cases cited in the judgment below; and contended that it was correct.

Clarke, in reply.

March 17. BOYD, C.:—The defendant purchased the land in question under a written contract, which is found to have been induced by the false representations of the plaintiff. Upon discovering the real state of the property, which fell short of the representations made, the defendant did not elect to rescind by abandoning the contract, giving up possession thereunder, and recovering what he had paid, but elected to remain in possession, and paid some instalments of the price thereafter. Then, making default in paying on account of the misrepresentations, he still continued to keep possession. By the terms of the contract thus affirmed and in force, the plaintiff was entitled to resume possession, forfeit all prior payments and deal with the property as his own. He was, therefore, entitled to succeed in the action

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for possession. The defence was that the contract should be rescinded for fraud, and all moneys paid to plaintiff should be restored to defendant. The trial Judge refused to rescind, but gave modified relief in damages thus expressed: "The damages are the amount of money he has paid, less the value he has had under the contract, and that is the value he has had for occupation purposes." That is, in essence, giving judgment for rescission, *i.e.*, for the restoration of all moneys paid under the contract as purchase money, less the amount of a fair occupation rent during his possession. The measure of damages appears to proceed upon an erroneous principle. If the defendant had discovered the misrepresentations before the completion of the sale, and had then refused to complete without compensation, the measure of that would have been the difference in value between the contract price and the lessened value attributable to the misrepresentations: *Tomlin v. Luce* (1889), 43 Ch. D. 191. The same would be the measure of damages if the purchaser had completed the purchase by payment of all the money, and had then claimed reparation for the misrepresentations. That relief might still be given if the defendant is willing to pay forthwith the proper value of the property, having regard to the amount to be deducted therefrom as compensation for the misrepresentations. This offer should be made to the defendant, on the footing of each party paying his own costs. This because, though the plaintiff succeeds in his claim, he has disputed the misrepresentations which have been found established upon the evidence at the trial.

If this is declined, the plaintiff should get judgment for possession. The only damage which can be awarded the defendant is on this footing: that during his occupation he enjoyed much less benefit from the house than if it had been up to the representations. It was cold and uncomfortable, and worth only about \$8 a month. He was, in effect, paying at the rate of \$14, and the difference, \$6 per month, may be allowed as damages—say, six months—\$36, and \$20 for repairs.

As against this he should pay occupation rent at \$8 from date of writ to January—say, four months, or \$32. Making deduction of this from \$56, balance is \$24 coming to defendant.

Instead of awarding costs on this view of the case, I would

say the defendant should forego the payment of \$24 by plaintiff, and appeal should be allowed without costs.

MABEE, J., agreed.

ANGLIN, J.:—The plaintiff appeals from the judgment of Riddell, J., delivered after the trial of this action, allowing the defendant the sum of \$182.10 for damages in respect of his counterclaim.

The plaintiff, by agreement, dated April 22nd, 1907, sold to the defendant a house and lot in the township of York. The purchase price, \$1,400, was payable, \$175 on the date of the agreement and the balance in 122 instalments, 121 of them of \$10 each, and a final instalment of \$15, all unpaid purchase money carrying interest at 6 per cent. The agreement further provided that time should be of its essence, and that, in default of punctual payment at the times and in the manner provided, all payments theretofore made should be forfeited and all rights of the purchaser under the agreement should cease, and that the vendor should be at liberty to enter upon and resell the lands without being accountable for moneys realized by the re-sale, unless he should seek to enforce the purchaser's covenant to pay contained in the agreement, which it was stipulated should remain in full force notwithstanding entry and re-sale by the vendor.

The purchaser having made default in payment, after he had paid \$210 on account of principal and \$18 on account of interest, and still remaining in possession, the vendor brought this action to recover possession of the premises. By counterclaim the defendant sought rescission of the agreement on the ground of fraudulent misrepresentations on the part of the vendor, and, in the alternative, claimed damages for such fraudulent misrepresentations. The default of the defendant being admitted, the learned trial Judge gave judgment for the plaintiff for the recovery of possession of the premises, but found in favour of the defendant that a number of fraudulent misrepresentations had been made by the plaintiff, which, had there been no waiver or acquiescence, would have entitled the defendant to a rescission. He further found, however, that with knowledge of most of these misrepresentations, the defendant had made a payment on the 22nd of July, and had continued to retain possession of the property

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to which he was only entitled under the agreement. The learned Judge held that these acts amounted to an election on the part of the defendant to affirm the agreement, and that he had, therefore, waived his right to rescission. Upon the defendant's alternative claim, however, he held that he was entitled to recover damages for the deceit practised upon him by the plaintiff, and he assessed the damages at the sum paid by the defendant on account of the purchase money, against which he off-set \$10 a month for occupation rent, less the sum of \$20 expended by the defendant in repairs. There is no appeal from this judgment by the defendant; and the appeal by the plaintiff is confined to the allowance made by the learned Judge for damages and to a claim of \$72.30 for occupation rent.

The ground upon which counsel for the plaintiff contended that the defendant is not entitled to damages for the deceit is that he has not paid the purchase price agreed upon, and that, in the absence of proof of special damage, he can be entitled, by way of general damages, only to the amount by which the purchase money paid exceeds the real value of the property sold to him. To such damages he contends the defendant can shew no right until he has actually paid his purchase money pursuant to the agreement. The learned counsel conceded that, upon paying a sum on account of the purchase money equal to the value of the house, the purchaser would be entitled to cease payment, to resist any action on the part of the vendor to recover the balance or to enforce the provisions of the agreement for default, and to insist upon a conveyance of the property. He further conceded that if the purchaser had paid the whole purchase money, or any part thereof, in excess of the real value, he would, upon the findings in his favour of fraudulent misrepresentations, be entitled by way of damages to recover back so much thereof as exceeded the real value.

From the decision, not appealed against, that the defendant has by his conduct waived his right to rescind the agreement and elected to affirm it, it follows that, even if he retained his right to damages for the deceit, and might use that right either by way of set-off against the vendor's claim for payment of the full purchase price or to maintain an action to recover back anything paid in excess of the real value, retaining the property, he would sus-

tain no such damage until he had paid more than its real value on account of the purchase price, and would have no right to enforce such set-off until the vendor sought to recover more than the actual value. Possibly the purchaser might, in anticipation, maintain an action for a declaratory judgment that the deceit of the plaintiff would entitle him to a reduction in the purchase money by the amount by which the price exceeded the value, and that he could resist further payment when he had paid such value. But I much doubt if the Court would entertain such an action. It seems to me quite clear that, though affirming the contract and retaining the property, the purchaser is not entitled, before he has paid on account of the purchase price a sum in excess of the real value, to a judgment for the payment of damages for the deceit.

Then, has the action of the vendor in terminating the rights of the purchaser under the agreement because of his default in payment and asserting and enforcing his claim to recover possession of the property, altered the situation so as to entitle the defendant to the judgment which has been pronounced in his favour? I am unable to see that such can be the effect of the vendor's action. The moneys which the purchaser has paid have not been lost to him by reason of the deceit of the vendor. On the contrary, if, notwithstanding an election to affirm the contract, the purchaser retained his right to damages for the deceit by which he was induced to enter into it, in carrying out the agreement, these moneys would have been applied towards paying the real value of the property, upon payment of which the purchaser's right to the property would have been absolute. The loss of this money to the purchaser is, therefore, attributable not to the vendor's deceit, but to the breach by the purchaser himself of the agreement, which the learned Judge finds he had lost his right to rescind by conduct evidencing an intention to affirm it. It is this default of the purchaser, and not the deceit of the vendor, which has resulted in the loss of these moneys, and I can find no valid reason for allowing the purchaser to recover as damages for the deceit of the vendor the moneys so paid under the contract. I, therefore, think the judgment entered below upon the defendant's counterclaim must be vacated.

With some hesitation I concur in the view of my Lord the

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Chancellor that the defendant may still be relieved upon equitable terms from the forfeiture incurred by his default. The defendant has not asked this relief, and it may be somewhat unusual that the Court should offer it to him unasked. But, in the circumstances of this case, it is apparent that, although the vendor may be technically in a position to claim that he has the right to retain the moneys paid by the purchaser as forfeited by the purchaser's own default, in retaining those moneys the vendor is in reality reaping the fruit of his own deceit. But for the fraud of the vendor the contract would, no doubt, have been carried out, and the purchaser would have enjoyed the benefit of his payments. It was only because he decided—too late, perhaps—to abandon the contract by reason of the house being of substantially less value than the vendor had represented it to be, that the purchaser may now find himself without house and without money. It may not strain too much the jurisdiction of this court of equity to allow him another opportunity to be relieved from the forfeiture of moneys which he has so incurred, particularly in view of the fact that it would appear that when he took the steps which deprived him of his right to rescission, he was under the impression that if he abandoned the contract he would not have the right to recover back the moneys which he had paid on account of the purchase price. In this sense he was not fully aware of all the legal consequences of the vendor's deceit; not fully apprised of the complete measure of his own rights arising therefrom. While this fact may be insufficient to prevent his conduct being treated as a waiver of the right to rescind, it seems to afford some equitable basis for giving to the purchaser this further *locus penitentiae* before his moneys are finally forfeited to the vendor. The Court cannot make a new contract for the parties. It can, however, allow one party to a contract, who has been wronged by deceit inducing the contract, to carry out the contract, and recover compensation for the deceit by way of damages to be set off against the contract price. The measure of that damage is the difference between the real value of the thing bought and its value as represented, which may generally be taken, for practical purposes, to be the contract price. Deducting these damages from the contract price will, therefore, as a general rule, leave as the balance the true value of the property. In the present.

case the contract price is \$1,400, which may be taken to have been the value of the property as represented. The real value upon the evidence may be fairly placed at the sum of \$920. The difference, \$480, may be taken to be the amount of the damages which the defendant would have sustained by reason of the deceit had the contract been fully carried out, and, therefore, the sum which he would be entitled to set off against the plaintiff's claim for payment of the full purchase price under the contract.

If the plaintiff is prepared to accept the sum of \$920 as the fair value, it may be so taken. If not, there must be a reference to the Master, at the plaintiff's risk as to costs, to determine what the fair value is. Upon the sum of \$920, or whatever other sum may be fixed by the Master as the value, if the plaintiff elects to take a reference, must be credited the payments already made by the purchaser. Upon payment of the balance, with interest at 6 per cent. per annum, within six months after the value shall have been ascertained, the defendant should be entitled to a deed of the property. The defendant must, however, elect within two weeks whether or not he will carry out the contract upon this footing. Should he elect to do so, judgment should be entered setting aside the judgment below, declaring the defendant entitled to a conveyance upon payment of the balance so ascertained, and dismissing the action, and this appeal, both without costs for the reasons assigned by the learned Chancellor.

Should the defendant elect not to carry out the contract as above indicated, the vendor's judgment for possession must stand, and his claim for occupation rent must be considered.

The vendor, taking advantage of the provisions of the contract enabling him to forfeit the money paid by the defendant, is not entitled to occupation rent up to the time when he elected to declare such forfeiture and demanded possession. From that date, however, he is entitled to such rental, which, having regard to the whole evidence, I would fix at the sum of \$8 per month from the 5th of September, the date of the writ of summons in this action, no proof of an earlier demand of possession having been made. From whatever sum the plaintiff may be entitled to for occupation rent on this basis should be deducted the sum of \$20 expended for repairs, and the plaintiff should be awarded the balance. I do not see my way to treat the whole or any

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part of the moneys paid by the defendant as rental during the time that he occupied the premises under the contract. The moneys were not paid as rental. They were paid as part of the purchase money, and the contract provides for their forfeiture as such. I cannot, therefore, concur in allowing to the defendant as damages the difference between a rental fixed on the basis of the purchase price and what would be a fair occupation rent.

If the defendant should elect not to carry out the contract on the terms above indicated, the plaintiff's appeal should be allowed, and the judgment below varied by striking out the adjudication in favour of the defendant for damages, and in lieu thereof there should be judgment for the plaintiff for the balance due to him for occupation rent as above stated. The plaintiff should, also, in this event have the costs of his appeal to this court.

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NOTE.—Though in the reasons payment was spoken of as to be made “forthwith” in case of election to complete the purchase, this on settling the minutes was varied so as to make it payable by instalments according to the terms of the contract, with proportionate reductions for the difference in value.

[DIVISIONAL COURT.]

IN RE LOCAL OPTION BY-LAW OF THE TOWNSHIP OF SALTFLEET.

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Intoxicating Liquors—Local Option By-law—Scrutiny of Ballots—Finality of Voters' List—Right of Deputy Returning Officers and Poll Clerks to Vote—Ontario Voters' List Act—7 Edw. VII. ch. 4, sec. 24 (O.)—R.S.O. 1897, ch. 245—6 Edw. VII. ch. 47 (O.)—Consolidated Municipal Act, 1903 3 Edw. VII. ch. 19, secs. 369, 371 (O.).

Under sec. 24 of the Ontario Voters' List Act, 7 Edw. VII. ch. 4, the voters' lists finally settled by the Judge are, upon a scrutiny, conclusive evidence that all persons named therein, and none others, are qualified to vote on a local option by-law, under the Liquor License Act, R.S.O. 1897, ch. 245, as amended by 6 Edw. VII. ch. 47 (O.), except as therein mentioned, and therefore no evidence can be then given, touching alienage, or minority of any voters named therein, or as to whether the name of a married woman is properly on the list or not.

Deputy returning officers and poll clerks are entitled, if qualified otherwise, to vote on such a by-law, if their names appear on the voters' list certified by the Judge and transmitted to the clerk of the peace. They may vote at the place where they act, though it be not their proper polling division.

In re Armour and Township of Onondaga (1907), 14 O.L.R. 606, 610, not followed.

As the law now stands under the present Voters' List Act, 7 Edw. VII. ch. 4 (O.), "scrutiny" of ballots cast on such a proposed by-law, within the meaning of sec. 369 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), is something different and more comprehensive than a simple recount. The extent of it is to be measured by what can be done on inspection of the ballot papers and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list in 7 Edw. VII. ch. 4, sec. 24 (O.).

A person who is a resident in the municipality in which a local option by-law is proposed and an elector therein has a *locus standi* to move for a prohibition to the county court Judge in respect to a scrutiny of the ballots at the voting.

The certifying of the result of such a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), is a judicial and not a merely ministerial act, and the Judge may be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result, to this extent that if he was not justified, in arriving at the result, in entering into the consideration of the qualifications of the voters, he may be prohibited from allowing these matters to affect his certificate.

THIS was an appeal from a judgment prohibiting the county court Judge of the county of Wentworth, in his certificate as to the result of a scrutiny of the ballots at the voting on a proposed by-law of the township of Saltfleet to prohibit the sale of liquor in the township, from making any allowance for or from taking into consideration any vote which he might have considered illegal by reason of disqualification of the voter, and ordering that he should be restricted to a scrutiny of the ballot

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papers, and that the result should not be affected by any determination by him as to the right of certain persons to vote.

The motion for prohibition was made before TEETZEL, J., in the Weekly Court, on February 6th, 1908.

H. E. Irwin, K.C., and *S. D. Biggar*, K.C., for the township of Saltfleet.

G. S. Kerr, K.C., and *J. G. Gauld*, K.C., for the Rev. Dr. Clarke, a resident elector.

G. Lynch-Staunton, K.C., for the petitioner for the scrutiny.

February 6. TEETZEL, J.:—This case has been very fully and ably argued on both sides, and I have had the benefit of reading the judgment of the learned Judge and of examining upon the argument the authorities which have been referred to by him and by counsel, and I do not think that any good purpose would be served by my reserving judgment, because I have arrived at a conclusion which would likely be the conclusion which I would express in writing later on, and it is to the advantage of both parties that I should deliver it now, in order that an appeal, if necessary, may be lodged and the question determined by a court of last resort as soon as possible.

Two preliminary objections were raised by Mr. Staunton: First, that the applicants have no status qualifying them to object to these proceedings; and, second, that this motion is too late, because what remains to be done by the learned county court Judge is only a ministerial act, he having performed all the judicial functions, and there is therefore no jurisdiction to prohibit him from certifying the result, as required by sec. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.).

As to the first of these objections, I am of opinion that, in the light of the provisions of the Act, and especially of sec. 369, which recognises an elector as the person entitled to apply to the county Judge for a recount, and sec. 378, which recognizes the right of a resident or other person interested in the by-law to apply to a High Court Judge for an order to quash, Dr. Clarke, who is admitted to be a resident and an elector, is a party interested and qualified to make the application. It was upon

him that the applicant before the county court Judge for the scrutiny served the papers, and as against him for the purpose of this motion he must be regarded as a person sufficiently interested to make the application for prohibition. I express no opinion as to the status of the corporation.

I am also of the opinion that the second objection fails. Under sec. 371 the learned Judge is authorised in a summary manner to determine whether the majority of the votes given is for or against the by-law, and is also authorised and directed forthwith to certify the result to the council.

I think that certifying the result is a judicial act, and not a mere ministerial act, and that he may be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result. That is to say, if he was not justified in arriving at the result to enter into the considerations of the qualifications of the voters, he might be prohibited from allowing those matters to affect his certificate. To that extent only could the Court, I think, grant prohibition.

Now, as to the substantial question upon the motion, it is undoubtedly one of those questions that are quite complicated and difficult of satisfactory determination. Two learned county court Judges have differed upon the construction of the powers conferred by secs. 369 to 372 of the Act, and there is, outside of these two opinions, I think, no decision by a High Court Judge, although a reference has been made to the observations by Mr. Justice Garrow in the *Sinclair and Owen Sound* case; but a perusal of that case, I think, makes it quite clear that it was not a necessary matter to be determined in that case as to whether the county Judge had power under these four sections to scrutinise anything beyond the ballot papers, and, therefore, the view expressed by my learned brother, Garrow, would, with deference, be, in my opinion, an *obiter dictum* and not binding upon me on this motion.

I do not read sec. 369 and the three following sections as conferring upon the county court Judge any power or right beyond a scrutiny of the ballot papers. I can find in those sections no authority for scrutinising the votes of the electors, in the ordinary sense of that term. In my opinion, the word "vote" and the

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words "ballot paper" are not synonymous or interchangeable expressions, but are quite distinct.

While a scrutiny of votes involves a scrutiny of ballots, as well as the qualification of the voters, I am of the opinion that an authority to scrutinise the ballot papers does not also involve any authority to scrutinise or ascertain the qualification of the voters who marked those ballot papers.

In the Ontario Controverted Elections Act, R.S.O. 1897, ch. 11, sec. 76, under the head of "scrutiny," the language used is "scrutiny of the votes polled at the election," and under that Act and the Rules of Court it is within the competence of the election court to inquire into the qualification of a voter, as well as to pass upon the sufficiency of the ballot.

Section 369 authorises an application to the Judge to enter into a scrutiny of the ballot papers. It seems to me that the purpose of this legislation was not only to give the county Judge the powers that are conferred upon him upon a recount under the Ontario Election Act—that is, to scrutinise the marks upon the ballots and count them—but also that he is authorised to call evidence such as he may deem necessary with reference to the ballots, so that he can ascertain exactly the number of ballots cast for and against respectively, and that he may determine upon something more than the mere ballot itself, if necessary, as to its validity or invalidity as a ballot.

I think that the purpose of sec. 372 was to confer that additional right upon a county Judge, and to give him the authority to have brought before him the voters' lists and all the material used at the election, and to call any evidence bearing upon the ballots, and for the purpose of a scrutiny of the ballot papers only, he should have the like powers possessed by him upon the trial of the validity of the election of a member of the council.

I think that if the Legislature had intended to authorise the county Judge to determine whether certain voters had the right to mark a ballot paper at all, and to authorise him to strike off votes for or against the by-law of persons who were not by law qualified to vote, it would have said so clearly and distinctly. I do not think that jurisdiction of this kind should be read into the Act, unless the language is sufficiently plain to make it quite clear that that was the intention.

Other provisions of the Act are sufficiently ample to allow those questions to be ascertained upon motions to quash. The Judges have in all these motions entertained evidence to shew that the by-law was supported by illegal or disqualified votes.

Mr. Staunton: Excuse me, my Lord, but I could not find any authority. I think the Act shuts us out entirely.

Mr. Justice TEETZEL: If that is so, the Judges have been wrong in the course they have been taking upon applications to quash by-laws.

Under sec. 378 and the following sections, a by-law may be declared illegal if not supported by a majority of legal votes, and against any decision thereunder there is an appeal. The proceeding under sec. 369 is by a summary application, with no appeal provided. This only furnishes another reason why the jurisdiction should not be conferred on the county Judge to do what is already amply provided for with an appeal, unless it is the very clear and manifest intention of the Legislature to do so.

I, therefore, think the motion for prohibition must be granted, prohibiting the learned Judge, in his certificate as to the result of the scrutiny, from making any allowance for or taking into consideration any votes which he may have considered illegal by reason of disqualification of the voter. In other words, that it shall be restricted to a scrutiny of the ballot papers, and the result shall not be affected by any determination by him as to the right of certain persons to vote.

The petitioner for the scrutiny appealed from the above judgment, on the following grounds, as set out in his notice of motion:—

1. The county court Judge had closed the scrutiny, and performed all his judicial functions, if any there were, before the application for prohibition was made, and all that remained to be done was the ministerial act of signing his certificate, as required by sec. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.). The High Court had no jurisdiction to prohibit the performance of a merely ministerial act.

2. Neither the township of Saltfleet nor the Rev. Dr. Clarke had any sufficient interest in the matter in question to entitle them to apply for prohibition.

3. By sec. 372 of the Consolidated Municipal Act, the Judge

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is invested with like powers and authority as are possessed by him upon a trial of the validity of the election of a member of a municipal council under secs. 219 to 232; and if it was intended that he be merely a counter of the votes, there is no reason for vesting him with any of these powers, because there is no conceivable evidence which he could receive, outside of the ballot papers.

4. Section 189, sub-sec. 8, of the Act sets out in detail what a Judge shall do on a recount. To perform any of the acts therein enumerated, it is unnecessary to do more than examine the papers. If it had been intended to limit his powers to that of a mere counter of votes, he would have been vested with the powers contained in sub-sec. 8 of sec. 189.

5. The Municipal Act having been consolidated, it is unreasonable to suppose that the draughtsman was not aware that he had set out in sec. 189, in detail, the directions to be followed on a recount, and thought that he should clothe the Judge with powers, not one of which is applicable to a recount.

The appeal was argued on February 21st, 1908, before BOYD, C., MAGEE and MABEE, JJ.

G. Lynch-Staunton, K.C., for the petitioner, referred to the above sections of the Consolidated Municipal Act, 1903, and contended that throughout the statute it was clear that a genuine scrutiny was intended, and that to accomplish anything, the Judge must get to the vote and not only the ballot papers; that if sec. 369 does not intend a real scrutiny, then no scrutiny is provided for at all; but sec. 366 (a) expressly requires a scrutiny. He referred to *Re Armour and Township of Onondaga* (1907), 14 O.L.R. 606; *Re Sinclair and Town of Owen Sound* (1906), 12 O.L.R. 488; *Regina v. Coursey* (1895), 27 O.R. 181.

H. E. Irwin, K.C., and *S. D. Biggar*, K.C., for the township of Saltfleet, contended that a scrutiny of the ballot papers was a recount and nothing else; that it was not the intention of the Legislature to empower the county court Judge to determine the whole question whether or not the by-law had been passed by the voters, *i.e.*, to go behind the voters' list, and determine whether the voters had a right to vote; that deputy returning officers and poll clerks should be allowed to vote: secs. 179 and

347; and that sec. 351 should not be interpreted as taking away that right; that there is nothing in the Municipal Act saying they shall not have a right to vote; that secs. 369 and 371 are identical with secs. 61 and 62 of the Canada Temperance Act, 41 Vict. ch. 16 (D.), and have been interpreted in the way contended for in *Chapman v. Rand* (1885), 11 S.C.R. 312; that when the ballot was adopted for elections of municipal councils and to voting on by-laws, the Legislature restricted the clerks to simply counting up the votes, and empowered the county court Judge to make a scrutiny of them: 39 Vict. ch. 35, secs. 18, 21 (O.); that in the case in hand the only judicial act of the Judge is issuing his certificate, and it is immaterial whether he hears evidence or not, and *Regina v. Coursey* is, therefore, clearly distinguishable. They also referred to *Re Weston Local Option By-law* (1907), 9 O.W.R. 250; *In re Salter and Township of Beckwith* (1902), 4 O.L.R. 51; *Re Mace and County of Frontenac* (1877), 42 U.C.R. 71; and as to the interpretation of sec. 372 of the Act, they quoted *Pretty v. Solly* (1859), 26 Beav. 606.

Lynch-Staunton, in reply, contended that the Judge could not be prohibited from stating the result he had come to; that if there was any right to obtain a prohibition, it must be done before the Judge has signed his certificate; that this was an attempt to induce the Court to entertain an appeal by a side wind: *In re Port Arthur and Rainy River Provincial Election* case (1907), 14 O.L.R. 345; and that the intention of the Canada Temperance Act was to give only a right of recount, and not a right of scrutiny.

March 3. BOYD, C.:—The Court of Appeal, in *In re Port Arthur and Rainy River Provincial Election*, 14 O.L.R. 345, have affirmed that the enactment as to voters' lists finally settled by the Judge being conclusive evidence that all persons named therein, and no others, are qualified to vote means precisely what it says, and that, therefore, no evidence can be given upon a scrutiny touching alienage or minority of any voters named therein. That decision includes the present enactment, which is (with an exception not material to the finality of the lists) in the same words as the one in force when the judgment was given. The list used

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in this case was made up under the authority of 7 Edw. VII. ch. 4, sec. 24 (O.). This declares that upon a scrutiny, under the Ontario Election Act or the Municipal Act, the list is final and conclusive, except as to persons guilty of corrupt practices, (2) persons who have become non-resident after the list was revised, corrected and certified (see sec. 56), and (3) persons not qualified or competent to vote under secs. 4-7 of the Ontario Election Act, R.S.O., 1897, ch. 9. Of these, sec. 4 relates to Judges, sheriffs and other officers of His Majesty. Section 6 relates to returning officers and election clerks and others taking part in the election under payment or promise of payment from the candidate; also no women are allowed to vote (sub-sec. 3): and by sec. 7 no prisoner, lunatic or one in receipt of support from charitable institutions.

The change made in the section in the last Act, 7 Edw. VII. ch. 4, is by adding after the words "upon a scrutiny," these: "under the Ontario Election Act or the Municipal Act." Under the Municipal Act "the scrutiny" may be in some respects different from "the scrutiny" provided by the Controverted Elections Act, R.S.O. 1897, ch. 11, secs. 76, etc. That provides for a scrutiny of the votes polled at the election of members; the former for the scrutiny of ballot papers cast in voting upon by-laws: 3 Edw. VII. ch. 19, sec. 369 (O.).

Under the Municipal Act women (unmarried or widows) are allowed to vote: *ibid.* sec. 353; not so as to any women in parliamentary elections. In municipal elections, whether for members of the council or on by-laws, deputy returning officers, poll clerks and agents of candidates in attendance at a polling place other than the one where he is entitled to vote, are enabled to vote at the place where they are acting: 3 Edw. VII. ch. 19, secs. 163, 179 (3), and 347.

The present Act, 7 Edw. VII. c. 4, sec. 2 (2), (O.), still retains a limited definition of "scrutiny" as meaning any scrutiny of the votes polled at an election within the meaning of the sections in the Controverted Elections Act, R.S.O., ch. 11, secs. 76, etc.; but the expression as "to scrutiny under the Municipal Act" must have effect given to it in sec. 24 of 7 Edw. VII. ch. 4 (O.), though the scrutiny may not be identical with that in the Election Act.

One exception from the finality of revised voters' lists is that of persons disqualified and incompetent to vote under secs. 4-7 of the Ontario Election Act. That Act, R.S.O. 1897, ch. 9, sec. 6 (1), declares that the returning officer and election clerk, etc., shall not be entitled to vote; but (2) says that the provision shall not apply to deputy returning officers and poll clerks. These last officers are, therefore, entitled, if qualified otherwise, to vote, and if their names appear on the voters' list certified by the Judge and transmitted to the clerk of the peace, they are, under the Municipal Act, entitled to vote on this by-law: see Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O), secs. 86, 89 and 148. Section 179 (3) appears to be continued from its original in 38 Vict. ch. 28, sec. 22 (O.) (1874), for prior to that year the Election Act forbade deputy returning officers and poll clerks from voting: see Election Act of 1868, 32 Vict. ch. 21, sec. 3 (O.), which prohibits them from voting, and was repealed in 1874 by 38 Vict. ch. 3, sec. 27 (O.). Its appearance in the Act of 1903 appears to be a matter of caution and merely affirms a right to vote, which otherwise exists.

I do not follow Mr. Justice Riddell's judgment in *In re Armour and Township of Onondaga*, 14 O.L.R. 606, holding that the amendment of 1903 takes away from the deputy returning officers the right they had to vote on such by-laws as this, which they enjoyed before the amendment: at p. 610.

As to the by-law, a right is given to vote by these officers at the place where they act, though it be not their proper polling division, if it be that they are otherwise qualified to vote by being on the revised and certified voters' list: see secs. 347 and 353, 354; also sec. 163, which is brought into the proceedings on by-laws by sec. 351. The exclusion by that sec. 351 of sec. 179 (3), saying that deputy returning officers, etc., may vote if qualified does in no way displace or affect their right to vote under sec. 347, which is found in the group of sections headed "Voting on by Electors," and with sub-head, "Who to Vote," in the statute of 1903, p. 245, 3 Edw. VII. c. 19 (O).

As to the other votes mentioned by Judge Snider, the two aliens and the two married women, these are not to be investigated upon a scrutiny, that being forbidden by sec. 24 of the Voters' List Act, 1907, 7 Edw. VII. ch. 4 (O.).

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If the name of the voter called a married woman is on the revised list, she is entitled to vote, whether married at that time or subsequently. For it is not within the list of excepted cases referred to in the Voters' List Act, 1907, sec. 24: a subsequent change of residence, which would disqualify, may be investigated under sub-clause (2), but not a subsequent change of status. If her name was not rightly put on the roll because she was then a married woman, that was the proper subject of investigation and correction before the final settlement of the lists.

If the farmers' sons' votes struck off as non-resident became so non-resident subsequently to the list being certified, that might be dealt with upon proper evidence by the county Judge.

The Judge has, therefore, exceeded his jurisdiction in going behind the ballot papers and the voters' list in these particulars, and he should be enjoined.

I may add that had our attention been called during argument to the present Voters' List Act, I, for one, should have been saved much trouble in the way of exploring the origin of the sections in the Municipal Act relating to re-count and "scrutiny." The action of the Legislature, in the last Voters' List Act, has had the effect indirectly of clearing up points which, I confess, appear to me involved in great obscurity and difficulty. As it now stands, the by-law scrutiny of ballots is something different and more comprehensive than a simple re-count. The extent of it is to be measured by what can be done on inspection of the ballot papers, and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list.

The appeal is dismissed with costs.

MABEE, J., concurred.

MAGEE, J.:—This appeal turns upon the construction to be placed on sec. 369 of the Municipal Act of 1903, 3 Edw. VII. ch. 19 (O.), providing for a "scrutiny of the ballot papers" by the county Judge after the voting on a municipal by-law. That provision has remained practically unchanged since first enacted in February, 1876, as sec. 21 of 39 Vict. ch. 35 (O.). To arrive at the intention of the Legislature we should look at the state of the law at that time.

Before the adoption of the ballot, the result of the polling was ascertained by the clerk of the municipality adding up the various poll books brought to him by the returning officers, and certifying it, whether in case of an election to the council or voting upon a by-law: 36 Vict. ch. 48, secs. 113, 118, 231 (O.). The only further proceedings indicated by the Municipal Acts for anyone dissatisfied were those yet in force in the nature of *quo warranto* for an election (secs. 131 to 151) and an application to quash in case of a successful by-law (secs. 240, 241, 243).

The ballot was introduced for provincial elections in March, 1874, by 37 Vict. ch. 5 (O.), which made no provision whatever for a recount or scrutiny. But in February, 1876, by 39 Vict. ch. 10, sec. 25 (O.), a "recount of votes" by the county Judge was allowed on affidavit of improper counting or rejection of "ballot papers" by a deputy returning officer, but the attendance was confined to the returning officer and his clerk and two persons on each side, and care was to be taken that the mode in which any particular elector had voted should not be discovered.

In December, 1874, the ballot was extended to elections for municipal councils by 38 Vict. ch. 28 (O.), which was amended in February, 1876, by 39 Vict. ch. 5 (O.), and both Acts were to be read as one and also as one with the Municipal Act. Under that Act, 38 Vict. ch. 28, secs. 19, 21 (O.), if, in counting at any polling place, the returning officer and any candidate or his agent differed as to the statement to be made, they went, on the next or a subsequent day appointed, before the clerk, who opened the sealed packets of ballots, examined the ballot papers, and "finally determined the dispute," and sealed up the ballots again, and himself signed the statement. This provision is still in the Municipal Act of 1903 (secs. 177, 178). Thus there was a summary and inexpensive recount by the permanent officer preliminary to and as a means of arriving at the result before it was announced. That Act expressly declared (in sec. 41) that it did not apply to by-laws.

In February, 1876, by 39 Vict. ch. 35 (O.), it was directed that by-laws should also be voted on by ballot. No mention was made of a recount, but by sec. 11 the proceedings at the poll and for and incidental to the purposes thereof were to be the same as nearly as might be as at municipal elections, and all the pro-

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visions of 38 Vict. ch. 28 (O.) should, so far as applicable and except as otherwise provided, apply, and the provision in 38 Vict. ch. 28, sec. 41 (O.), that that Act should not apply, was repealed, as was also sub-sec. 4 of sec. 231 of 36 Vict. ch. 48 (O.), which had assimilated the polling, etc., on by-laws to those on elections. Then by secs. 21, 22, 23 and 25 of 39 Vict. ch. 35 (O.) (now secs. 369 to 372 of the Municipal Act of 1903) were introduced the provisions now in question. Thereby any elector might within two weeks apply upon petition to the county Judge, on shewing by affidavit "grounds for entering into a scrutiny of the ballot papers," but he was to enter into a recognizance in \$100, with sureties, to prosecute the petition and pay "the party against whom the same is brought" any costs awarded, and the Judge was to appoint a day and place within the municipality for entering into the scrutiny, and was to direct what persons should be notified, and they were to have at least a week's notice, and the Judge, upon inspecting the ballot papers and hearing such evidence as he might deem necessary, and hearing the parties or their counsel, was in a summary manner to determine whether the majority of the votes given was for or against the by-law, and certify the result to the council, and he might award costs, which were to be in his discretion, "as in the case of applications to quash a by-law," and he was to have the like powers "as to all matters arising upon such scrutiny" as were possessed by him upon the trial of the validity of an election of a member of a municipal council.

For the respondents it is argued that the scrutiny so authorized was and is merely a recount of the ballot papers, involving only a decision upon their genuineness or validity as votes and upon each voter's intention evidenced thereby. For the appellants the contention is that it means not only that, including an inquiry into how the ballots actually cast were marked, but also the ascertainment of the right of each person who voted to do so.

The word "scrutiny" was discussed in *Chapman v. Rand*, 11 S.C.R. 312. The Legislature had itself used it in several statutes. By 32 Vict. ch. 21, sec. 45 (O.), no returning officer or deputy was to "grant, make or enter into any scrutiny of the votes given at any election" for the Legislature. That was

before the ballot system, but it was continued as R.S.O. 1877, ch. 10, sec. 112, and as it was the duty of each deputy returning officer to decide upon the validity of the ballots, and in whose favour they should be counted, and do that as carefully and effectually to the best of his ability as the Judge would do, it is manifest that the prohibited "scrutiny of the votes" meant something more. In the Controverted Elections Act, R.S.O. 1877, ch. 11 (from 36 Vict. ch. 2), provision was made, in secs. 72 to 81, for "a scrutiny of the votes polled in case of there being any votes which were objected to," and it is to be noted that by sec. 75 of that Act "the Judge shall possess the like powers and authority as to all matters arising upon such scrutiny as are possessed by him upon a trial in the ordinary manner." These words, originally in 36 Vict. ch. 2, sec. 32 (O.), are almost the same as appear in sec. 25 of 39 Vict. ch. 35 (O.), and now in sec. 372, in question here, and manifestly were copied into that provision. In 41 Vict. ch. 21, sec. 23 (O.), voters' lists were made final and conclusive (with certain exceptions) upon a "scrutiny," but that was defined to be a scrutiny of the votes polled at an election within the meaning of secs. 72 to 81, already referred to, of R.S.O. 1877, ch. 11. In April, 1907, however, by 7 Edw. VII. ch. 4, sec. 24 (O.), they are made final upon a "scrutiny" under the Municipal Act. This sec. 369 is the only place in the Municipal Act where "scrutiny" is mentioned. The previous references I have made were to a "scrutiny of the votes." But there we find that when the Legislature was making provision for a scrutiny after voting on by-laws which required a majority not merely of those voting, but of all entitled to vote, such as a by-law granting a bonus to a railway, it was provided in 43 Vict. ch. 27, sec. 16 (O.), that "in case of dispute as to the result of the vote, the Judge shall have the same powers for determining the question as he has in any case of a scrutiny of the votes;" and "the petition to the Judge may be by any elector or by the council; and the proceedings for obtaining the Judge's decision shall be the same as nearly as may be as in the case of a scrutiny."

What scrutiny, what petition, what Judge, what power, and what proceedings are here referred to, if not those in secs. 21 to 25 of 39 Vict. ch. 35 (O.), which alone mention scrutiny or petition or a defined Judge? And if those, then the "scrutiny of

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the ballot papers" is spoken of as a "scrutiny of the votes," and some indication is given of what the Judge is expected to do. The present secs. 366 and 366 (a) are similarly worded.

Another matter for consideration is the nature of the procedure. The *quo warranto* proceedings and the application to quash involved formal procedure, writs, rules, recognizances, evidence, counsel, and costs. This new scrutiny of 1876 involved petition, recognizance, evidence, counsel, and costs, not to mention affidavits and notices, and whereas the recognizance on the *quo warranto* was to be for \$200, and (now) on the application to quash \$50, that on the petition was to be for \$100." On a recount before a Judge on a provincial election, or before the clerk on a municipal election, or afterwards, under 46 Vict. ch. 18, secs. 162, 163 (O.), before the Judge, there was no such formality nor such expensive adjuncts of litigation. In 1883, indeed, a deposit of \$25 on a recount before a Judge was required. But throughout there was to be restricted attendance, and the secrecy of the ballot was to be maintained.

These considerations would lead one to conclude that the scrutiny intended was more akin to the more formal proceedings than to the recount, and to be of a more extensive nature. If it be asked what, then, was the object, two important changes which would thereby be made present themselves. Firstly, there had been no machinery provided in the Act for a supporter of a defeated by-law to question the declared result, and this new scrutiny could be asked for by any elector. Secondly, proceedings by *quo warranto* could be taken either before a Superior Court Judge or the county Judge, whereas proceedings to quash could not be taken before the latter, although the evidence might be taken before him. And it is to be noted that this new sec. 25 gave him discretion over costs "as in the case of applications to quash a by-law." This new scrutiny, if not limited to a mere recount, would enable parties to have the question disposed of in the county, so far at least as the matter of scrutiny of votes. And in this connection one may recall that on election trials for the Legislature, the scrutiny may be proceeded with before one Judge or the registrar, though other questions require two Judges, and also that to procure it the procedure is by petition.

If, then, the scrutiny was to be broader than a recount, was

there to be no simple recount of the votes on a by-law? And the answer to that is, I think, of much importance upon this appeal. There was exactly the same recount for a by-law as there was for a municipal election. As already mentioned, sec. 11 of 39 Vict. ch. 35 (O.) (now sec. 351 is analogous) had assimilated the election proceedings at the poll, etc., and made 38 Vict. ch. 28 (O.) applicable. That did not make all the sections of the latter apply, as was held in *Canada Atlantic R.W. Co. v. Corporation of the Township of Cambridge* (1887), 15 S.C.R. 219. But one would consider the counting as a proceeding at the poll or for or incidental to the purposes thereof, and certainly as "applicable." As the statement upon which the clerk was to ascertain and announce the result was, in case of dispute, to be made by the clerk from a re-examination and consequent recount, that recount must also, I think, be placed in the same category as the count by the returning officer, and be introduced by sec. 11 referred to, unless "otherwise provided" by 39 Vict. ch. 35 (O.). Indeed, sec. 13 of the latter Act shews that the proceedings under 38 Vict. ch. 28 (O.), up to the statement at least, are adopted. If 38 Vict. ch. 28 (O.) had stood alone, it might be argued that secs. 14 to 18 of 39 Vict. ch. 35 (O.) introduced a different procedure, and did not allow of a recount by the clerk, but they are only copies of secs. 11, 13 and 15 of the amending Act, 39 Vict. ch. 5 (O.), and secs. 19 and 21 of 38 Vict. ch. 28 (O.), and do not "otherwise provide" than was directed by those two Acts, which are to be read as one. It would seem, therefore, clear that there was the same recount by the permanent officer, the clerk, which was considered sufficient for the elections.

That being so, why should a second recount be required for by-laws which was not allowed for elections? and why should the Legislature, if by "scrutiny" it meant recount, abandon the words "recount" and "examination," used in other Acts of the same session, or from which whole sections were being copied, and adopt a word previously so differently used and understood? And why, again, when in 1883 a recount before the county Judge was granted, was not the same expression, "scrutiny," and a similar procedure adhered to?

Another reference to the language chosen may not be without weight. I have already referred to the word petition as

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used in connection with provincial election trials under 34 Vict. ch. 3 (O.) and 36 Vict. ch. 2 (O.). By 37 Vict. ch. 5, secs. 23, 24 (O.), inspection of provincial ballot papers was restricted, unless for the purpose of a "petition questioning an election or return." Now, sec. 28 of 38 Vict. ch. 28 (O.) was evidently adapted from them, and also restricts inspection of municipal ballots, unless for a "petition questioning an election or a return," and then we find the scrutiny is to be obtained by petition, and is the only proceeding by petition. And the petition is brought "against" someone (see sec. 21 of 39 Vict. ch. 35 (O.)) of which there is no hint in any recount sections.

Little can be learned from the requirement as to the affidavit to be used. It was, however, to shew reasonable grounds for entering into the scrutiny, whereas the affidavits for a recount on a provincial election, and, later on, on a municipal election, was only that a deputy returning officer, in counting the votes, had improperly counted or rejected some ballot papers, and no recognizance was required.

I will not here dwell on the power of hearing evidence and counsel, and determining "in a summary manner," and the powers as if on a trial of a municipal election, but would only point out that, under sec. 141 of 36 Vict. ch. 48 (O.), that also was to be determined "in a summary manner."

On the whole, it appears clear to me that the scrutiny was to be more than a mere recount or a critical examination of the ballot papers, and was to be in the nature of the trial of a controverted election, but limited, as I shall have occasion to observe. What was intended, I think, bore somewhat the same relation to the application to quash as the scrutiny does to an election petition, but was open to both sides, and not limited to one, as the application essentially was.

Then, why did the statute not say "scrutiny of the votes," instead of "scrutiny of the ballot papers"? Three explanations present themselves, even if we credit the Legislature with inevitable accuracy of expression. One is that it was intended to shew that it did not exclude a determination from the result of an examination of the ballot papers themselves, including rejected ballot papers, which, if properly rejected, are not votes, as pointed out by Rose, J., in *Re Canada Temperance Act and St Thomas*

(1885), 9 O.R. 154. Another is that it was not intended to give any colour to an assumption of right to make an elector disclose how he voted, which on a provincial election could be traced so soon as his vote was found invalid. And a third that in the new system votes and ballot papers, especially when properly marked, were considered as interchangeable expressions. I have already referred to "the scrutiny of the votes" on kindred by-laws in 43 Vict. ch. 27, sec. 16 (O.). In the recounts by the Judge under 39 Vict. ch. 10, sec. 25 (O.), and 46 Vict. ch. 18, sec. 162 (O.), the Judge was, as he is now, to "recount all the votes or ballot papers returned:" There, too, we read of voters "marking their votes" and "marking their ballot papers," of "votes counted" and "ballot papers counted," and of "ballot papers rejected as voting" for too many, and, on a recount, the Judge is to recount the votes on proof that the returning officer had improperly counted the ballot papers. In *Ex parte Boyne* (1882), 22 N.B. 228, even Allen, C.J., said votes and ballot papers were synonymous, and a ballot was a vote.

Here one is met by the decisions of the Supreme Court and the Court of Appeal upon the analogous provision in the Canada Temperance Act, 1878, 41 Vict. ch. 16, sec. 61 (D.). In *Re Canada Temperance Act and St. Thomas* (1886), 12 A.R. 677, the Court of Appeal followed, without comment, the decision of the Supreme Court in *Chapman v. Rand*, 11 S.C.R. 312. In the latter case the majority of the Court expressed concurrence with the conclusion arrived at by Mr. Justice Rose in *In re Canada Temperance Act and City of St. Thomas*, 9 O.R. 154. The Canada Temperance Act had followed, in secs. 61 and 62, the words of secs. 21, 22 and 23 of 39 Vict. ch. 35 (O.), but omitted sec. 25, which refers to powers as on a trial and an application to quash. It had also omitted any provision for a mere recount, and by sec. 48 declared the decision of the deputy returning officer upon a ballot paper final, subject only to reversal upon the scrutiny, thereafter mentioned. In sec. 70 that Act copied sec. 38 of 38 Vict. ch. 28 (O.). There was no additional or analogous legislation of the Dominion Parliament referred to, and in the Supreme Court the Act was treated as being *sui juris*, and even the "tribunal" referred to in sec. 20 was difficult to find. Now, Mr. Justice Rose had pointed out (at p. 161) the omission of the provision in sec. 25

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of 39 Vict. ch. 35 (O.) (then sec. 316 of the Municipal Act, R.S.O. 1877), and considered that omission and the non-introduction of any provision similar to those for such a trial to be "a most formidable objection." I take it that he at least would have been prepared to consider the Ontario legislation from a different standpoint. If, in addition, the Canada Temperance Act had contained a provision for a recount exactly similar to what was provided for cognate elections, and omitted sec. 48, the same conclusion might not have been arrived at either by him or the Supreme Court, especially if there was a body of other legislation to compare it with, and the majority of the latter court might not have felt compelled to say that the Legislature had failed to make a broader "intention apparent by any reasonable inference." The important point at present is that the Dominion Act stood by itself for construction, and a decision upon it, though of the greatest weight, is not conclusive as regards legislation having other provisions. Here I may say that, while the reference in sec. 25 to the powers on a trial are entitled to consideration as indicating what was in the intention of the Legislature, they do not seem to me to add really the powers as on a trial, for they are limited, after all, by the words "as to all matters arising upon the scrutiny," and, therefore, are restricted to what the scrutiny may authorize and the discretion over costs, as on an application to quash, is necessarily likewise confined.

Assuming, then, that the Judge is not limited upon the scrutiny to a mere recount or otherwise within the bounds sought to be fixed by the respondents, what are his powers upon this scrutiny? To ascertain that we have to leave the consideration of the statutes as they stood in 1876, and come to the present date, although the extent of possible authority then might aid materially in establishing whether or not it was given to him; but, unless incidentally, I will not stop to deal with its original extent. Some other matters have first to be looked at.

By 38 Vict. ch. 28 (O.), as now by the Municipal Act, not only was secrecy of voting provided for in various ways, but by sec. 34 (now sec. 200 of the latter Act) no person could, in any legal proceeding to question the election or return, be required to state for whom he had voted. In the *Haldimand (Dom.) Election* case (1888), 1 Elec. Cas. 529, Strong, J., held that the secrecy could

not be waived under the Dominion statute, which, however, he considered to be different from the Ontario statute, therein, doubtless, referring to the mode of tracing a vote under the latter. That distinction does not exist as to municipal ballots.

There was not in 1876, as there is not now, any way of tracing the ballot of any particular voter at a municipal election, upon a scrutiny, by reference to any counterfoil number or otherwise, as there was in case of an illegal vote at a provincial election.

Although in the preparation of the voters' lists the decision of the county Judge, upon the revision of the list, was final as to whatever names came before him (37 Vict. ch. 4, sec. 5 (O.)), it was not until 1878 that the whole list, as revised, was made, as it now is, final and conclusive (except as to certain matters), upon a scrutiny, on a provincial election—41 Vict. ch. 21, secs. 23 (O.)—and not until 1907—7 Edw. VII. ch. 4, sec. 24 (O.)—in a municipal election. Whether that includes voting on this by-law is, perhaps, a question, as it is voted on by all municipal electors, but some by-laws are not. By 36 Vict. ch. 48, sec. 77 (O.), the rating on the assessment roll was final, and not to be questioned by any returning officer or on any application to set aside an election; and by 40 Vict. ch. 12, sec. 20 (O.), no question of qualification was to be raised at any municipal "election," excepting the question of identity. The voter could, however (and can), be sworn on various points, including the subject of his being bribed, but if he took the oath, he must then, as now, be admitted to vote, unless in default for taxes in certain cases. The word "election" is not defined by the Municipal Act, 1903, but "electors," by sec. 2, includes voters on a by-law or an election, and by the interpretation Act, R.S.O. 1897, ch. 1, sec. 10, that definition extends to all enactments relating to municipalities, and would include those parts of the Voters' List Act which so relate. The finality was dealt with in the *South Wentworth (Ont.)* case (1879), H.E.C. 531, and see *Reg. ex rel. Mackenzie v. Martin* (1897), 28 O.R. 523. Whether in this case the list would be final, it is certain that for most by-laws it would not be, as the franchise is more limited. Even for this by-law it would not be final in cases of persons subsequently disentitled by corrupt practices or by non-residence—7 Edw. VII. ch. 4, sec. 24 (O.)—nor would it be as to persons disqualified by acting as deputy returning officers, poll clerks, or

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constables, if that were a disqualification; nor as to those certified in default for payment of taxes, nor persons forfeiting their vote under sec. 170 of the Municipal Act, or if, after the revision of the voters' list, found guilty under secs. 250, 251, and other sections. Manifestly, then, on every by-law it might possibly be that persons voted who could not legally do so. Now, I take it that a scrutiny involves not such matters as affect the validity of a whole election—*e.g.*, void proceedings, corrupt practices, etc.—but the inquiry into the right of the particular voter to vote, and whether and how he has voted, in so far as either inquiry is permitted by law, and the application of the result of such inquiry to the particular question being dealt with.

If, by reason of bribery or other corrupt practice, the particular voter lost his vote, that would be a proper subject of inquiry on the scrutiny, not as affecting the election or by-law generally, but as affecting his vote thereon; and here I may note that in *quo warranto* cases the county Judge can inquire into bribery, etc., under sec. 248. In *Ex parte Rand* (1885), 24 N.B. 374, Palmer, J., seems to go so far as to say that if the election were not properly held, and were consequently invalid, the votes would be invalid, and might as such be, under the Canada Temperance act, individually struck off; but that is, I think, far outside the powers under this scrutiny. As put by King, J., in that case, it contemplates ascertaining the adoption or rejection of the by-law, but not a determination that there was no valid election. I agree with him that it would include an inquiry into the result of the voting in case of loss of ballots, and that secondary evidence as to the ballots might be taken, as was held in *Ex parte Le Blanc* (1896), 34 N.B. 88.

Then, having found that persons not entitled to vote voted, that would reduce the total number of votes out of which the majority is to be ascertained.

In the present case the learned county Judge has found that four ballots were polled by deputy returning officers and five by poll clerks, and these he would strike off, following the judgment in *Re Armour and Township of Onondaga*, 9 O.W.R. 833. I am unable to agree with that decision, because it depends upon the assumption that these officers would lose their votes but for sec. 179. Section 86 of the Municipal Act declares the qualifica-

tion, and I do not find anything to take it away, if they went to the polling place of the sub-division where their names appear on the voters' list. To prevent them having to leave their own polling booths, sec. 347 was passed. It certainly recognizes the propriety of their voting at elections. The exception of the whole of sec. 179 in sec. 351 has, I think, been inadvertent, but I do not see that it has the effect suggested.

Those nine votes should not be disallowed, nor should those of the five constables engaged at the polling places, whom the county Judge also states to have voted.

Then there is one vote of a farmer's son, whose father had only two acres. As to that the voters' list seems to be final; so, also, with regard to two aliens. With regard to the person on the voters' list whose qualification has been lost by non-residence, that is one of the exceptions to the finality of the list mentioned in 7 Edw. VII. ch. 4, sec. 24 (O.), and should be struck off. As to two married women who voted, it does not appear whether they are alleged to have been married only since the revision of the voters' list or before. If before, the list is final; if since, I would have been inclined to think the votes should be disallowed, but I am not prepared to dissent from the views of the other members of the Court thereon. I agree with the judgment appealed from as to the status of the applicant for the prohibition, and as to the propriety of its issue at that stage, but I think it should not have prevented the county Judge from the inquiry into the validity of votes when deciding upon the proper counting of the ballot papers, but that it should be limited to disallowing votes upon the grounds referred to.

It is said there were blank ballot papers found in the ballot boxes. It would be within the Judge's province to decide whether these were ballots issued to and deposited by voters or whether improperly or accidentally placed among the others, and whether to disregard them or not.

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Feb. 5.

Will—Mortmain and Charitable Uses—Presbyterian Church in Canada—Validity of Devise—Testamentary Capacity—Attesting Witnesses as to—Undue Influence—New Trial.

A residuary devise of realty to the Foreign Missionary Society of the Presbyterian Church in Canada is valid under the Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, sec. 4, notwithstanding *ibid.* ch. 333, sec. 7, sub-sec. 6, which requires "assurances" of land for charitable uses to be made six months before the donor's death, "assurances" in that section not including gifts by will; and also notwithstanding that the special Act relating to devises to the said church, 38 Vict. ch. 75 (O), requires wills of realty and impure personality in favour of that church, to be made 6 months before the testator's death.

In an action to impeach a will on the ground of undue influence, it should not be upheld on the evidence of one witness, whose credibility is attacked, when the attesting witnesses may also be examined; and a new trial was ordered in this case because this had not been done.

As a general thing, witnesses to a will should inspect and judge of the testator's sanity before they attest. If he is not capable the witnesses ought to remonstrate and refuse their attestation.

Judgment of Riddell, J., at the trial reversed.

THIS was an appeal by the plaintiffs from the judgment of Riddell, J., at the trial.

The action was brought by the plaintiffs, on behalf of themselves and of other heirs-at-law and next of kin of Joseph Madill, against the executors of the will of Joseph Madill, the Toronto Hospital for Sick Children, the board of trustees of the Presbyterian Church in Canada, and certain other beneficiaries under the will and heirs-at-law and next of kin of the testator, to have the will declared invalid on the ground of undue influence, and in the alternative for a declaration that the residuary devise and bequest contained in the will, which was in favour of the Foreign Missionary Society of the Presbyterian Church, be declared void, and for administration.

The facts of the case are sufficiently stated in the judgments.

The action was tried at the non-jury sittings at Barrie on October 28th, 1907.

G. W. Bruce, for the plaintiffs.

H. Cassels, K.C., for the Presbyterian Church in Canada

J. Porter, for the executors.

C. E. Hewson, K.C., for the other defendants.

October 30. RIDDELL, J.:—An action tried by me without a jury at Barrie. The statement of claim alleges that the late Joseph Madill, being under the influence of his pastor, the Rev. Mr. McConnell was, while he was in a weak and enfeebled condition of body and mind, induced by him to make a will; that this will was so made by Joseph Madill when he was not of testamentary capacity; that the will was not properly executed; and that the provisions of the said will were ineffectual in law.

I may say at once that there is no foundation for the claims as to undue influence, irregularity of execution and incapacity of the legatees. The only question is whether the testator was at the time of testamentary capacity. Considerable evidence was given of a more or less vague character indicating a failure of physical and mental power; and Dr. Nidrie, the attending physician, gave more specific evidence, Dr. McCarthy being then called as an expert to give his opinion upon the evidence of Dr. Nidrie. The defendant McConnell being called, gave a very detailed account of the circumstances under which the will was drawn; and it is admitted that if he is to be believed the decedent was of testamentary capacity and the will must stand. The plaintiffs, recognizing this fact, called a number of neighbours to testify that from the reputation of McConnell they would not believe him on oath. Some of these witnesses spoke from dealings they had had themselves with McConnell, but in the case of others all the conditions of such evidence were fulfilled. Several of these witnesses belonged to a malcontent section of the reverend gentleman's church, and some, as I have said, had business dealings with him. He appears to have been agent for Roller Bearing and other stock, and to have sold some of these to his friends. Even with the altered meaning of the word, it seems as unwise now as it was 1900 years ago for those sent to preach to carry scrip; many cases in the courts have shewn the danger of serious trouble arising from ministers dealing with such precarious merchandise—and this both to themselves and others.

I did not and do not place much reliance on this character evidence. Much of it was clearly given gladly and with a desire to injure the minister; and much of it was given without a thorough understanding of the foundation upon which such evidence should be based.

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At all events, from the conduct and demeanour of Mr. McConnell in the box, I was and am convinced that he was telling the truth. Dr. McCarthy was not recalled after the evidence of Mr. McConnell; and it was admitted that he would and must say that the decedent had a disposing mind if Mr. McConnell was telling the truth. The opinion of Dr. McCarthy was based wholly or mainly upon the evidence of Dr. Nidrie—and I do not place entire confidence in the accuracy of that evidence. Where the evidence of Mr. McConnell and that of Dr. Nidrie are inconsistent, I accept the evidence of the former. In all cases I judge of the credit and weight to be given to the evidence by the conduct and demeanour of the witnesses.

Had I the slightest doubt as to the substantial accuracy of the evidence of Mr. McConnell (which I have not), it would be removed by the evidence of the Rev. Mr. Mackay (against whom there is no imputation). He gave evidence of conversations with the deceased a few months before the will was drawn, which indicated that his mind was running in the direction the will displays.

Moreover, no benefit of any kind accrued to Mr. McConnell from the provisions of the will—the suggested benefit of executor's remuneration he would equally receive if the will were drawn in any other way—and if he could be such a rascal as to have a will made by an incompetent man, the natural thing to expect would be that he would take care to have some substantial benefit for himself or his.

I find that the charges against Mr. McConnell are absolutely and entirely without foundation in fact, and that the action should be dismissed.

In the exercise of my discretion, I direct that the costs of the executors and of the Church be paid between solicitor and client by the plaintiffs and the defendants who made common cause with them, *i.e.*, Mary VanAllen, Jennie Southall, Letitia McLaren, Richard Langtry and Frederick Thornbury. Counsel for these stated at the trial that they were making common cause with the plaintiffs, and he assisted counsel for the plaintiffs throughout with suggestions. The practice of bringing action in the name of some only of the next of kin and making the other parties defendants is sometimes necessary, but parties so made defendants should understand that if they make common cause with the plaintiffs they do so at

their peril as to costs, and that the fact that in form they are defendants will not protect them. My power to award costs between solicitor and client in such a case as this seems to be established by *Andrews v. Barnes* (1888), 39 Ch.D. 133; *Sandford v. Porter* (1889), 16 A. R. 565, and cases cited (although the rule may be different in a purely common law action: *Cree v. St Pancras Vestry*, [1899] 1 Q.B. 693, at p. 698). And it has been held in England and here that a successful party may be ordered to pay the costs of the unsuccessful party: *Myers v. The Financial News* (1888), 5 Times L.R. 42; *Neale v. Winter* (1862), 9 Gr. 261. So that, even if it could be considered that these defendants were (as they are not) successful, they might be ordered to pay costs.

The executors will be entitled to all costs out of the estate between solicitor and client which they cannot make out of those ordered to pay. The Presbyterian Church being residuary legatees, it is unnecessary to make such an order as to them.

The appeal was argued before BOYD, C., ANGLIN and MABEE, JJ., on January 24th, 1908.

G. W. Bruce and N. B. Gash, for the plaintiffs, cited as to the question of mortmain: *Re Huyck* (1905), 10 O.L.R. 480; *Douglas v. Simpson*, [1905] 1 Ch. 279; Maxwell on Statutes, 4th ed., pp. 237, 244; Hardcastle on Statutes, 3rd ed., pp. 330, 332-7; 38 Vict. ch. 75 (O.); R.S.O. 1897, ch. 112, sec. 4; 2 Edw. VII. ch. 2, sec. 7, sub-sec. 1, 6, O. They contended that *Re Kinny* (1903), 6 O.L.R. 459, was founded on English decisions, whereas the English Mortmain Acts are the reverse of those in Ontario. They also referred to *Wilson v. Wilson* (1875), 22 Gr. 39; *Waterhouse v. Lee* (1863), 10 Gr. 176; *Donaldson v. Donaldson* (1866), 12 Gr. 431; *Freeman v. Freeman* (1889), 19 O.R. 141; *Fulton v. Andrew* (1875), L.R. 7 H.L. 448; *Robson v. Rodke* (1824), 2 Addams 54; Taylor's Medical Jurisprudence, 5th ed., p. 856; Amer. and Eng. Encycl. of Law, 2nd ed., vol. 28, p. 770.

H. Cassels, K.C., for the Presbyterian Church in Canada, referred to *Adams v. McBeath* (1897), 27 S.C.R. 13; *Baudains v. Richardson*, [1906] A.C. ¶169, 179; 63 Vict. ch. 135 (O.).

C. H. Porter, for the executors.

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February 5. BOYD, C.:—The bequest to the Foreign Mission of the Presbyterian Church of mixed property is valid under the Ontario Act of 1874, 38 Vict. ch. 71, sec. 10, and 63 Vict. ch. 135, which impose the condition that the will be made at least six months before the death of the donor. This condition is removed by the General Act, R.S.O. 1897, ch. 112, sec. 4, and this amending law is not restricted as to testamentary dispositions by the later Act of 1902, which is now to be found in vol. 3 of the R.S.O. at ch. 333. The appellant relied on sec. 7, sub-sec. 6, as re-imposing the six months' limit. This argument rests on the meaning to be given to the word "assurance" used in the section. He relies on the interpretation clause of the Act, sec. 2 (1), which declares that assurance includes a gift by will; but it is to be noted such may be the import "unless the context otherwise requires." The context in sec. 7, sub-sec. 6, shews that the assurance referred to is one which may be made "in good faith for full and valuable consideration," language which repels the idea of a voluntary and ambulatory testamentary instrument. Such has been decided in *Re Kinny* 6 O.L.R. 459, by my brother MacMahon, and in *Re Barrett* (1905), 10 O.L.R. 337, by my brother Teetzel, and also recognized by me in a later decision, *Re Battershall* (1907), 10 O.W.R. 933. The bequest for missions is a charitable use: *Toronto General Trusts Co. v. Wilson* (1895), 26 O.R. 671, and so the benefaction falls within the very words of R.S.O. 1897, ch. 112, sec. 4, which is not controlled by the special Act as to the Presbyterian Church. I do not think, therefore, that the appellant can claim any relief on this ground.

Upon the other branch of the appeal, asking for a new trial, I agree with both my colleagues that a sufficient case is made out upon the evidence already before us to call for more searching inquiry as to the validity of the will. Briefly, I will set forth my reasons for this conclusion. At present the will is proved by the sole testimony of the person who drew it, and who is one of the executors, Rev. J. A. McConnell.

According to his evidence, the testator dictated the whole of the will as he wrote it down. He made no suggestions; all emanated from and was originated by the deceased. He was told by the deceased that the estate was worth about sixteen thousand dollars, and with the exception of nineteen hundred dollars given to eight

relations and five hundred dollars to the Sick Children's Hospital, all the rest goes to the Foreign Missions of the Presbyterian Church. The will was completed by noon on November 17th, 1905, at the close of a two or three hours' visit, and was disclosed to no one, with the possible exception of the two subscribing witnesses (not examined). It was taken away by McConnell and not made known (even to his co-executor) until after the funeral on February 27th, 1906.

On the other hand, it is clearly proved that the deceased was a weak and sickly man, mentally below the average, in age about sixty, but by reason of his infirmities more like a man of seventy-five or eighty years. In particular he had a severe attack of acute dysentery, which began on November 14th, 1905, and lasted until the 24th, during which he suffered great pain and was much reduced by physicking and opiates. His worst day was on November 17th (the date of the will), when the doctor called twice, at 9.30 a.m. and again about 3 or 4 p.m., and found the patient the same on both occasions, *i.e.*, dull and somnolent; could be roused momentarily, but would drop off again and relapse immediately, so that in the physician's opinion he was unfit to make a will.

This general condition given by his regular physician, Dr. Nidrie, is corroborated by a witness called for the defence, John Coulton, as to the "bad spell in November." A very experienced physician, Dr. McCarthy, having heard the evidence of Dr. Nidrie's treatment and condition of the deceased, was of like opinion, that there was a lack of mental capacity on November 17th.

The character of Mr. McConnell for integrity and truthfulness was impeached by six witnesses of apparently respectable standing—two of whom were Presbyterians as he was—the others without even a suspicion of the *odium theologicum* to which the trial Judge alludes. The evidence, however, indicates that the minister's tarnished reputation arose rather from his connection with the sale of stocks (Roller Bearing and Straw Cutting varieties) than from any doctrinal conflict.

The two attesting witnesses were brought in by McConnell after the will had been completely drawn out; one his own wife and the other the wife of the other executor, Mrs. Madill. The deceased had been living with Mrs. Madill and her husband for eleven months before his death, and she was the nurse during this severe illness

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in November; a more important witness as to his condition during that time and on that day (apart from the attending physician) could not be found.

In this state of conflicting evidence, with no reason to prefer the testimony of the clergyman to that of the physician; with important witnesses not called and the evidence of the sole witness who proves the will, so seriously discredited, it seems a most dangerous precedent not only to sustain the will, but impose all costs on the relatives. True, some of them after probate accepted their small legacies, but they were without the knowledge of all the matters now disclosed; and even of the plaintiffs one is exempt from any criticisms. The whole difficulty arises from the prostrate condition of the deceased, and the secrecy surrounding the testamentary act. Though not benefitted directly by the will, the person who drew it is not without some interest, not only in regard to the executorial purposes, but also from the importance of upholding the land transaction he had with the deceased after the making of the will. Incompetency at the date of the will would imply incompetency to deal with the land, and enough is disclosed of that transaction to shew that it may reflect on the clergyman.

This is unquestionably a case in which the usual course of the Court as to evidence should be observed. In the trial of an issue *devisavit vel non* the rule of the Court is to require that all the attesting witnesses should be examined, they being the witnesses of the Court and not of the parties; so that no fear of the parties saying, "this is your witness and the other is mine," shall ever prevent the Court of Equity, whose conscience is to be informed by the trial, from having all of them called. This is the doctrine of Lord Eldon accepted by the House of Lords in *McGregor v. Topham* (1850), 3 H.L.C. 132, at p. 155-6. If a will is to be supported on the testimony of one witness as against a variety of suspicious circumstances, that witness must be of unimpeachable and unimpeached integrity: *Brydges v. King* (1828), 1 Hagg. Eccl. 256. The proof must be in proportion to the greatness of the suspicion; the greater the loss of capacity, the more stringent the necessity for adequate proof of the knowledge of the testator. These are well known maxims which must not be disregarded.

The law as to the manner of executing and attesting a will, is not of form but of substance, in order to protect testators in their

hours of weakness or of extremity. I fear that the men who draw wills, whether legal, lay or clerical, too often lose sight of the function of the attesting witnesses. Let me cite the memorable words of Lord Camden in *Hindson v. Kersey* (1760), as found in 4 Brown's Eccl. Law, 9th ed., p. 120: "What is their employment? I say to inspect and judge of the testator's sanity before they attest. If he is not capable the witnesses ought to remonstrate and refuse their attestation. In all other cases the witnesses are passive; here they are active and in truth the principal parties to the transaction; the testator is entrusted to their care." And he says again emphatically, in words carried into modern law by Taylor in his work on Evidence, 9th ed., vol. 2, sec. 1854, p. 1215, the reasons for calling all the attesting witnesses whom the law places around the testator appear to be substantially that: "Frauds are commonly practised upon dying men whose hands have survived their heads."

Here a new trial is asked for, and it should be granted on the ground that there is reason to believe that a second trial may afford more satisfactory grounds upon which final adjudication may be found: *Locke v. Colman* (1836), 2 M. & Cr. 42.

It remains to deal shortly with the question of costs. I think, according to the well established rules in probate practice, that costs should come out of the estate where the litigation has reasonably arisen out of the condition of the testator and the circumstances of secrecy which have been adverted to. I would refer to such cases as *Goodacre v. Smith* (1867), 1 P. & M. 359; *Davies v. Gregory* (1873), 3 P. & M. 28; *Wilson v. Bassil*, [1903] P. 239; and *Spiers v. English*, [1907] P. 122.

One set of costs should be given to the plaintiff and those in the same interests, and one set to the charitable beneficiaries as between party and party, and one set of costs as between solicitor and client to the executors, and all to be paid out of the estate. That is intended to include the costs of the first trial and of this appeal. The other costs will be dealt with on the next trial.

ANGLIN, J.:—The circumstances surrounding the preparation and execution of the will in question in this action are in my opinion such as should excite the suspicion of the Court. Unless the person propounding the will by affirmative evidence removes that sus-

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picion and satisfies the Court that the testator knew and approved of the contents of the will, probate should not be decreed. This rule is not confined to cases in which the will benefits the person by whom it is prepared: *Tyrrell v. Painton*, [1894] P. 151.

The condition of the health of the testator, the fact that his brother with whom he was living was kept in ignorance of this will being made, and the disposition made of the bulk of his estate by the will, suffice to arouse suspicion as to his capacity and as to the methods by which his testamentary bounty was procured.

The only evidence of regularity of execution, and practically the sole evidence of testamentary capacity, is furnished by the defendant McConnell, who is named as an executor, and who himself drew the will when alone with the testator. It is suggested that McConnell, though not directly interested as a legatee, is indirectly interested in the management of the estate, and that he may also derive some advantage from the large residuary bequest.

However this may be, it is quite apparent that if Dr. Nidrie, the attending physician, told the truth, the testator was in such a condition throughout the day on which his will was prepared that it is scarcely possible that he could have had testamentary capacity. Dr. Nidrie saw him in the morning and again in the afternoon, and swears that on both occasions he was very drowsy and somnolent from the effects of opiates which were being freely administered. Upon the question of testamentary capacity Dr. Nidrie and the defendant McConnell are directly at issue. Dr. Nidrie has no apparent interest in the result of this action. For reasons which a perusal of the proceedings does not disclose, the learned trial Judge discredited Dr. Nidrie's evidence and accepted that of the defendant McConnell.

Neither of the two witnesses to the will gave evidence. One of them—Mrs. Madill, a sister-in-law of the testator—was unable to attend the trial. The other witness—Mrs. McConnell, the wife of the defendant—was available. At the conclusion of the evidence of McConnell the learned trial Judge is reported to have said, "I do not insist upon the witnesses to the will being called unless you insist upon it, Mr. Cassels." Mr. Cassels represented the principal beneficiaries. This probably accounts for Mrs. McConnell not having been called as a witness.

In my view the suspicion surrounding this will was not sufficiently

cleared away by the evidence of the defendant McConnell. In every case where solemn probate is required at least one of the witnesses to the will should be examined if possible: *Belbin v. Skeats* (1858), 1 Sw. & Tr. 148. But where there are reasons to suspect the capacity of the testator and the influences affecting him when the will was in course of preparation, the testimony of the witnesses to the will, if they are alive, seems to me almost indispensable.

Upon the ground that the trial did not remove the suspicion which the defendants propounding this will were bound to clear up so as to satisfy the conscience of the Court, there should in my opinion be a new trial of this action. Had the learned Judge not himself dispensed, apparently spontaneously, with the testimony of the witnesses to the will, it may be doubtful if the defendants would have been entitled to this indulgence.

As the contention of the appellant that the residuary gift to the Presbyterian Church is void because in contravention of the statutes respecting Charitable Uses, commonly known as the Statutes of Mortmain, was fully argued, it is perhaps better that it should be now disposed of, in order that it may not be necessary to deal with it upon the new trial which we direct.

Counsel for the appellant argued that because the will of the testator was not made more than six months before his death this gift cannot take effect. His contention is that because the special Act, 38 Vict. ch. 75, sec. 20 (O.), validating testamentary gifts of realty or impure personalty in favour of the Presbyterian Church in Canada made by a will executed at least six months before the death of the testator, stands unrepealed, the general provisions of R.S.O. 1897, ch. 112, have no application to such gifts. I am unable to agree with this view.

In the first place the special Act does not declare that gifts made by will executed within six months of the testator's death shall be invalid. The invalidity of such gifts depends upon the general statutes in regard to charitable uses. The Revised Statute is by sec. 10 inferentially made applicable to all devises or legacies which would have been void if made by a testator dying before April 14th, 1902. That Act, subject to certain conditions, removes in favour of all devises for charitable uses the restrictions which special Acts had partially removed in favour of certain charitable and religious

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bodies. As an enabling and relieving enactment it should be liberally construed. In my opinion it was intended to apply to devises for charitable uses of land or impure personalty, whether made in favour of bodies already permitted to take such gifts under conditions not fulfilled by particular testamentary dispositions or in favour of persons or bodies enjoying no exemption from the restrictions of the Statute of Mortmain and Charitable Uses. The special Act, 38 Vict. ch. 75 (O), contains nothing inconsistent with the relieving provisions of the revised statute being applied to the Presbyterian Church in Canada. In cases in which devises comply with the requirements of special Acts, and would therefore be valid without the aid of the statute, the statute has no application (sec. 10), and the donee is not required to obey the direction for sale of land within two years (sec. 4). But in other cases—where the donee theretofore enjoyed no exemption whatever from the Statutes of Mortmain and of Charitable Uses, or enjoyed such exemption upon conditions not fulfilled by the particular instrument under which the claim arises—the Revised Statute validates the gift subject to the condition subsequent which it imposes. To hold otherwise would defeat the purpose of the Act and render it inapplicable to nine out of every ten charitable devises, made, as they are, in almost every instance, in favour of bodies enjoying partial exemption similar to that conferred by the special Act upon the Presbyterian Church in Canada.

It was further contended on behalf of the appellant that the statute, 2 Edw. VII. ch. 2 (O.) (now R.S.O. 1897, ch. 333), imposes upon all gifts of realty for charitable uses the condition that such disposition must be made at least six months before the death of the donor, and that, inasmuch as this statute was enacted subsequently to the Revised Statute, ch. 112, it supersedes or qualifies the provisions of the earlier Act. The Revised Statute, ch. 112, deals solely with devises of land and legacies of impure personalty. The Revised Statute, ch. 333, deals generally with dispositions of land (not including money secured on land or other personal estate arising from or connected with land) in Mortmain or for Charitable Uses. Subsection 6 of sec. 7 imposes upon every such assurance of land or of personal estate, other than stock in the public funds, not made in good faith, for full and valuable consideration, the condition that it must be made at least six months before the death of the assurator;

and, by sub-sec. 1 of sec. 2, "assurance" is made to include a gift, devise and bequest by deed, will or other instrument. But this definition is subject to the proviso, "unless the context otherwise requires." The introduction of the words "for full and valuable consideration" in sub-sec. 6 of sec. 7, makes it reasonably clear that in that sub-section the word "assurance" is not intended to include a gift by will or a devise or bequest. The context, therefore, does require that the word "assurance" should in that sub-section be read as not including a will, devise, or bequest. The Revised Statute, ch. 333, is by sec. 1 made part of the Mortmain and Charitable Uses Act, R.S.O. ch. 112. Reading these two statutes together, and having regard to the language of sub-sec. 6 of sec. 7 of the latter Act, it is quite obvious that it was not intended by that statute to alter the conditions upon which the Revised Statute, ch. 112, permitted devises and bequests for charitable uses to take effect. The contention of the appellant upon this branch of the case therefore fails.

I agree in the disposition made by my Lord, the Chancellor, of the costs of the former trial and of this appeal.

MABEE, J.:—The question at issue in this action is the validity of the will of Joseph Madill, deceased, and as I am of opinion that the action must be tried again I shall content myself with a statement of the facts that lead me to the conclusion that the action has not been satisfactorily tried.

The deceased was about 60 years of age, although from a complication of diseases from which he was suffering he was said to be, in appearance, more like a man of 75 or 80 years of age.

For some two years prior to his death he had made his home at his brother David's.

The will in question purports to have been made on November 17th, 1905; the death took place on February 23rd, 1906. Late in the summer of 1905 Norman Thomas Clark Mackay, a Presbyterian minister, met the deceased and says, in answer to a question as to what he, Mackay, would suggest a man should do with money who had money to leave, that he told the deceased: "The missions has a commendable object, he need have no doubt of leaving it to them, and I said the Sick Children's Hospital was an institution doing a great deal of good." This witness says he sent him a report

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of the Sick Children's Hospital, that he saw deceased again on Thanksgiving Day of the same year, talked again about these two charitable objects, and the deceased told him they were managed extravagantly, and he (the witness) allayed his mind as to that.

On November 17th John Arthur McConnell, a Presbyterian minister, visited him, with the result that a will was prepared by McConnell, by which the property of the deceased was disposed of as follows: Legacies amounting to \$1,900 were given to brothers, sisters, nephews and nieces; \$500 to the Sick Children's Hospital; all the balance of the estate, real and personal, was given to the Foreign Mission of the Presbyterian Church. David Madill and McConnell were named as executors. The estate is valued at about \$16,000. The only witness called at the trial as to the facts connected with the execution of the will was McConnell. He says it was dictated to him by the deceased, and he (McConnell) gave no suggestions to him; that he was with him some two hours, and after getting it ready for signature, he (McConnell) went home and brought his wife to sign as one of the witnesses, telling her she was to witness a will. He then asked Mrs. David Madill to come into the room to witness a paper, not telling her it was a will, that the deceased signed in the presence of these ladies, and they signed as attesting witnesses; it was not read over in the presence of the witnesses; and that Mrs. Madill did not know she was witnessing a will, so far as McConnell knew. McConnell then sealed up the document and took it away with him.

Mrs. Madill was ill and unable to attend the trial. Mrs. McConnell was present but was not called. David Madill knew nothing of the will until after his brother died.

In January, 1906, McConnell sold the deceased some lands in the Northwest, taking his notes for them. These lands were held under an option by McConnell, and sold to Madill at a profit. In February, 1905, McConnell had sold deceased five shares of "Straw Cutter stock," whatever that may have been. Some time in 1905 the deceased paid McConnell \$200 or \$250, to be paid on account of Henderson Roller Bearing stock. McConnell, however, says he did not sell this to deceased, but that some man named Lamont did.

Probate of the will was obtained by solicitors acting for Mc-

Connell, the application being made almost at once after the death occurred.

Dr. Robert Nidrie had been the attendant physician upon deceased for about eleven years, and he says he was in daily attendance upon him from November 12th to November 24th, 1905; that he visited him twice on the 17th, the day the will was executed—in the forenoon about 9 o'clock, and again between 3 and 4 in the afternoon; that deceased was taking about $1\frac{1}{2}$ grains of powdered opium and 5 grains of salol every 4 or 5 hours, from November 12th to the 20th; that on the 17th he was in a somnolent condition; that when he went in on both occasions on that day he had to rouse him up and that he would immediately relapse; that from the effects of the opiate and his weakened condition he was not in a condition to make a will on November 17th.

Dr. McCarthy, who heard the evidence of Dr. Nidrie, stated, that assuming the facts as given by Dr. Nidrie to be true, the deceased was not in a condition to make a valid will upon that day.

McConnell says the man was clear and bright and there were no traces of any opiate on the 17th. He and Dr. Nidrie are the only witnesses who have spoken of his condition upon the day in question.

Robert Steele, Daniel G. Mitchell, Archibald Curry, William McKay, and John McKay (one a Presbyterian elder, another an ex-member of the Legislature), swore they would not believe McConnell upon oath.

I think the plain circumstances of the case require a more careful investigation of all the facts surrounding the execution of this alleged will, and that the action should not have been disposed of without the evidence of the attesting witnesses.

Dr. Nidrie apparently had no interest in this contest, McConnell is not a disinterested witness, and no reasons have been given why the evidence of the interested one, whose credibility was attacked as above indicated, should have prevailed over that of the other.

I do not think it necessary at this stage to refer to the questions raised during the argument of the effect of the Mortmain Acts.

The costs of the last trial and of this motion should be paid to the plaintiffs and those in like interest out of the estate forthwith after taxation.

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IN RE COCHRANE.

Life Insurance—Changing Beneficiary—Identifying Policy—“By number or otherwise”—Extrinsic Evidence—R.S.O. 1897, ch. 203, sec. 160.

R.S.O. 1897, ch. 203, sec. 160, “The Ontario Insurance Act” provides that the assured may vary a policy previously made so as to restrict, extend, etc., the benefits, or alter the apportionment, inter alia, by a will identifying the policy by a number or otherwise.

The assured, in this case, being the holder of a beneficiary certificate in a benevolent society made payable to his wife, by his will bequeathed “out of my life insurance funds the sum of \$200 to my sister,” and “all the rest, residue and remainder of my insurance funds. . . to my daughter” :—

Held, that this did not sufficiently identify the beneficiary certificate above mentioned, nor was it permissible to prove by extrinsic evidence that the testator must have referred to it as he held no other policies.

Re Cheesborough (1897), 30 O.R. 639, specially discussed.

Semble, even were it otherwise, the widow's claim would have been good to the extent of the \$200 assumed to be bequeathed to the sister.

THIS was an appeal from an order made, upon an application by the executor under the will of Andrew J. Cochrane, who died on November 12th, 1907, for payment out of a certain fund in court, representing the proceeds of a beneficiary certificate issued to the deceased by the Grand Lodge of the Ancient Order of United Workmen, and of which he was the holder at the time of his death.

The widow of the testator, Jean M. Cochrane, who was a party to these proceedings, also claimed the monies, on the ground that at the time of the testator's death the certificate was expressed to be payable to her, and that, although the testator, in his will, was alleged to have revoked the direction of payment to her, by directions that \$200 should be paid to his sister, and the balance, with his other estate, to his daughter, Christina C. Burnett, the will did not so express or imply, or have this effect.

The provisions of the will are set out in the judgment of this Court.

The application was heard before MEREDITH, C.J.C.P., in Chambers, on March 10th, 1908.

F. Aylesworth, for the applicant.

A. G. F. Lawrence, for the widow.

March 10. MEREDITH, C.J.:—I think I am bound by *Re Cheesborough* (1897), 30 O.R. 639, and *Re Harkness* (1904), 8 O.L.R. 720, to hold that the policy in question or the moneys payable under it have been well appointed by the provisions of the testator's will, subject to the question whether the bequest to Lily Cochrane can take effect.

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I am unable to distinguish these cases, especially the *Harkness* case, from the present case. In the *Cheesborough* case the language was more easily fitted to the provisions of the statute, because there the provision of the will was "all my policies or certificates of insurance." In this will there is no reference to policies; the language is "insurance fund," and in the *Harkness* case similar language was used.

I do not see that I can distinguish these cases upon the ground urged by Mr. Lawrence—that in them there were no preferred beneficiaries outside of those that were created by the will. I do not see how that would make any difference. There is nothing in either of the cases, as far as the judgments have been read to me, which indicates that the fact that the bequests were made to preferred beneficiaries would have made any difference in the result.

Then it is said that, because the testator speaks of the subject of his bequest as "my life insurance fund," that cannot include these insurance funds, because they were subject to a trust; that the testator had no power of disposition, except a disposition by will, and, therefore, that they did not come within the description "my life insurance funds." I think that is too technical a view of the matter. While, perhaps, in a technical sense they were not his life insurance funds, they were his—in the event of the death of his wife, who was the beneficiary, they would have been absolutely free for any disposition of them he might choose to make, and, therefore, I think, might well be described as his life insurance fund.

No doubt the provision in the second paragraph of the will by which the \$200 is appointed to his sister, Lily Cochrane, is invalid, because she was outside of the preferred class, but by the Wills Act, R.S.O. 1897, ch. 128, sec. 27, unless a contrary intention appears by the will, such real estate or interest therein as is comprised or intended to be comprised in any devise, in such will contained, which fails or becomes void by reason of such devise

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That was always the law as to personal property, and so I think this disposition of the residue is an effectual disposition of the whole of the proceeds of the policy in question in favour of Christina C. Burnett.

Then, in regard to the other question raised by the widow, that the testator was not of sound mind at the time he made his will, so long as the probate stands that question is not open to be litigated. If Mr. Lawrence desires to raise that question, the order that I make upon this motion declaring the rights of the parties will not take effect for a month, to enable him in the meantime to take such steps as he may be advised for the purpose of getting rid of the probate and establishing that the testator was not of sound and disposing memory at the time he made his will, and, if such a proceeding is brought, and so long as it is prosecuted with diligence, the order will be stayed.

Mr. Lawrence: If the widow were to instruct me sooner, I suppose, upon my notifying my learned friend, it need not delay him issuing his order.

Chief Justice MEREDITH: Oh, no; not if you withdraw that claim.

As far as this application is concerned, it seems to me it is a proper case that the costs should be paid out of the fund.

Jean M. Cochrane appealed from the above judgment, upon the following grounds, as set out in her notice of motion:—

(1) That the will of the said Andrew J. Cochrane, deceased, does not, by its terms, identify the policy in question, in accordance with the requirements of sec. 160 of the Ontario Insurance Act, R.S.O. 1897, ch. 203, so as, by its provisions, to transfer the benefits of the policy from the testator's wife, Jean M. Cochrane, the beneficiary named in the policy, to the testator's sister and daughter, or either of them, the beneficiaries attempted to be named in his said will.

(2) If the will of the said Andrew J. Cochrane, deceased, does sufficiently identify the policy in question in accordance with the requirements of sec. 160 of the Ontario Insurance Act, that

part of the said will which purports to transfer \$200 of the moneys payable under the said policy to the testator's sister, Lily Cochran (who is not one of the preferred class of beneficiaries) is void against the original declaration in the policy in favour of the testator's wife, Jean M. Cochrane (who is one of the preferred class of beneficiaries), being contrary to the provisions of the Ontario Insurance Act in that regard.

The moneys payable under said policy form no part of the testator's estate. The declaration in respect of \$200 of said insurance moneys, in favour of the testator's sister, being void, the provisions of the Wills Act do not operate to pass the said \$200 under the residuary clause in said will, as stated by the learned Chief Justice in giving his reasons for the order now appealed from.

(3) That part of the said will which purports to transfer the residue and remainder of the said insurance moneys payable under the said policy from the testator's wife to the testator's daughter, Christina C. Burnett, by its terms blends the said insurance moneys with the residue of the testator's general estate, and renders it subject to the claims of the testator's creditors, and is, therefore, void as being repugnant to the terms of the Ontario Insurance Act in that regard.

The appeal was argued on March 16th, 1908, before BOYD, C., MAGEE and MABEE, JJ.

A. G. F. Lawrence, for the appellant, referred to *Re Cheesborough*, 30 O.R. 639; *Re Harkness*, 8 O.L.R. 720; *MacLaren v. MacLaren* (1907), 15 O.L.R. 142; *Webb v. Honnor* (1820), 1 Jac. & W. 352; *Mattingley's Trusts* (1862), 2 J. & H. 426; *Re Duncombe* (1902), 3 O.L.R. 510; R.S.O. 1897, ch. 203, secs. 159, 160.

F. Aylesworth, for the executor.

March 23. The judgment of the Court was delivered by BOYD, C.:—The fund in question consists of moneys paid into court, \$1,000, to represent the value of a beneficiary certificate issued by the Ancient Order of United Workmen of the Province of Ontario to the deceased, Andrew J. Cochrane, on November 15th, 1900, and made payable to his wife, Jean, the

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now appellant. He was married to her on September 19th, 1900, having children by a former wife, and he separated from her on March 13th, 1905. He made a will on June 10th, 1907, and died November 10th of the same year. The will contains these clauses:—

“(2) I give and bequeath out of my life insurance funds the sum of \$200 to my sister, Lily Cochrane.”

“(3) All the rest, residue and remainder of insurance funds, real and personal estate of what kind so ever, I give and bequeath to my daughter, Christina C. Burnett.”

The question is this: Does the will change the certificate as to the beneficiaries? That depends upon the meaning of sec. 160 of the Insurance Act, R.S.O. 1897, ch. 203, and evidence that its directions have been complied with. It reads that the assured may by instrument in writing attached to or endorsed on or identifying the policy by its number or otherwise vary a policy . . . previously made so as to restrict, extend, etc., the benefits . . . and may by instrument in writing attached to or endorsed on the policy or referring to the same *alter* the apportionment; he may also by his will make or alter the apportionment of the insurance money . . . and whatever the assured may under this section do by an instrument in writing attached to or endorsed on or identifying the policy or a particular policy or a policy by number or otherwise, he may also do by a will identifying the policy or a particular policy or policies by a number or otherwise.

The manner of identification of the policy is very explicitly and pointedly provided for. It may be by instrument in writing attached to or endorsed on the policy or apart from actual attachment or endorsement, it may be identified by something equivalent in the way of specific reference by the number of the policy “or otherwise.” That would, of course, include reference by date and amount and other means of incorporating one document with the other. Should the words “or otherwise” be extended further to cases where extrinsic evidence is required to complete the identification? Two cases are relied on as going this length. *Re Cheesborough*, 30 O.R. 639: the testator had five policies, of which two had been designated to beneficiaries, his son and his other children; the other three were payable to

himself. As to these three, it was held that, under general words, "all my property, including life insurance policies and certificates," to trustees in trust for his children, they passed to the beneficiaries, and were not subject to creditor's claims as part of his estate. These three policies, payable to himself, and existing at the date of his will, were deemed to be identified by the general words when all the policies were given. The two policies which were designated to his one son and the other to his children beneficiaries were not included in this decision, and it does not appear to have been suggested that the words of the will would have any effect upon them. They were, in truth, not the property of the testator, but were payable as a trust fund to the beneficiaries, and so not within the words of the will. Again, as to this case, it is to be observed that there was a sixth policy made after the date of the will, and payable to the testator; it was held that the will did not effect any apportionment in respect to this policy, and that it stood payable to the testator himself, and was simply part of the personal estate: see p. 644.

The effect of this decision, therefore, is that the general language of the will did not affect policies theretofore designated to beneficiaries; nor did it operate on a policy made to the testator after the date of the will. The meaning of this must be that there was, as to this last, no policy existing at the date of the will, by reference to which it could be identified. The will was thus treated, in regard to this section of the Insurance Act, as speaking not from the death of the testator, but from its date.

The other case was *Re Harkness*, 8 O.L.R. 720, where the testator had one policy payable to his order or heirs, and by his will he gave the residue of his property, including life insurance, to his wife and children. It was held that these words made it as certain and clear as in the *Cheesborough* case what policy of insurance was meant, and that there was complete identification. Both cases, therefore, apply to a situation where the policies dealt with and referred to are part of the testator's estate, and not to policies which are not his, but are held subject to a trust for the designated beneficiary, and as to which he has power to alter the designation by his will. The will, as to these, operates not *quoad* his estate, but as to property over which he has and may exercise an appointing power. It is one remove from the

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testamentary disposition of property which is his own, and the case in hand is not covered by any decision in our courts.

Where a trust is clearly and distinctly expressed on the policy itself in favour of one beneficiary, so that it becomes a vested trust for that person, it should not be displaced or altered except by a document of equal evidential force in clearness and distinctness of designation.

Here, reading the will by itself, you have no evidence of identity between the policies in question and the vague expressions in the will: "\$200 out of my life insurance funds to my sister, and the residue of insurance funds to my daughter." Then, it is said affidavits may be used to shew that there was nothing else to which the reference would apply but to the policy in question. The policy is not his property, and you can only infer that he may have intended to dispose of this policy, although his designation of \$200 of it is not warranted by the statute ch. 203, because not being to a preferred beneficiary. I doubt whether this method of explaining the will and making out the identification is within the scope of the words "or otherwise." He may have thought erroneously that the policy was payable to himself or his order, and so was in his control to dispose of to his sister as well as to his daughter. He may have intended to acquire other insurance on his life which would be part of his estate at his death. He may, also, have intended to provide for the case of the wife dying before him, in which case the policy might form part of his estate, under 4 Edw. VII. ch. 15, sec. 7 (8) O. (enacted April 26th, 1904), and so speak of it and dispose of it as his policy. All these possible contingencies are open to conjecture, and so displace that clear, sure and certain identification which seems to be imperative, having regard to the repeated and particular expressions of the Insurance Act. There is no explicit revocation of the trust vested in the wife, and there is no implied revocation expressed with unequivocal certainty.

The policy in question was not part of the testator's estate, so, perhaps, cases upon the exercise of powers in making appointments of property afford more light than can be elsewhere obtained. A leading case is *Webb v. Honnor*, 1 Jac. & W. 352 (1820): A testator had a general power of appointment over a sum in the funds, and had no other funded property. He bequeathed

all his personal estate, consisting of money invested in any of the public funds, household furniture, etc. This was held to be no execution of the power. The circumstances of his having no other funded property was not to be adverted to as material. The Master of the Rolls (Sir J. Plumer) said, at p. 357-8: "In this instrument (the will) there is nothing to shew that the testator meant to dispose of anything but his own property; every part of it is satisfied by giving all that he was possessed of. He speaks of his personal estate, and every word he has used ties it up to the property that then belonged to himself or that he might before his death become entitled to. It would, therefore, be impossible by any evidence to shew an intention in this will to pass property not belonging to himself, but over which he had a power. . . . He speaks, among the different articles of personalty that he enumerates, of property in the funds; and it is possible that he might have been considering this sum, but it would be too dangerous for the Court to presume that when he has used language not applying to it."

Mr. Lawrence cited another later case since the Wills Act, which also proceeds upon and sustains *Webb v. Honnor*. That is *Re Mattingley's Trusts*, 2 J. & H. 426 (1862). The testator had power to appoint a trust fund, consisting of a sum of consols. He disposed of all his personal estate and his money in the funds. Apart from the consols, he had no money in the funds. Held, the will was not an appointment. Page Wood, V.C., said "the point to be ascertained in all these cases is whether the testator appoints to a specific fund in existence, or is merely enumerating the different particulars of which he supposed his property may consist at his death. The words of this will favour the latter view:" p. 428. *Re Mattingley* has been quoted with approval by Kay, J., in *In re Mills, Mills v. Mills* (1886), 34 Ch.D. 186, 193, where it is laid down that the burden of proof rests on those who assert affirmatively that the power was exercised, and that the Court must be satisfied with this by sufficient evidence. And *In re Mills* was approved by the Court of Appeal in *In re Esther Williams, Foulkes v. Williams* (1889), 42 Ch.D. 93.

The Wills Act, R.S.O. 1897, ch. 128, sec. 29, has no application to the case of limited power such as that exercisable with reference to beneficiaries under the Insurance Act: *Cloves v.*

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Awdry (1850), 12 Beav. 604; but only to cases in which the testator has power to appoint in any manner he may think proper. The power, if exercised by the testator in this case, would be so in a manner not warranted by the terms of the Insurance Act, and so afford internal evidence that he was not acting with reference to this trust fund. As remarked by Kay, J., in *In re Mills*, at p. 191 (citing *Doe v. Bird* (1809), 11 East 49), such indications are not to be disregarded.

I am not at present prepared to accept the conclusion of Ferguson, J., as to the sixth policy of insurance effected after the date of the will, having regard to the 26th section of the Wills Act; but it is not necessary to dwell upon the matter in the present controversy.

Altogether I am not satisfied that the policy payable to the wife, now in question, was in any certain way identified by the testator, and, therefore, I hold his will did not change the beneficiary. Judgment should be in favour of the wife (widow) as to the whole fund. No costs of the appeal.

Costs below may be left as directed by that judgment.

Taking this view as to the whole fund, it is not necessary to deal with the effect of the will on the \$200 given to the sister on the supposition that the power has been duly exercised, but, so far as I have investigated the point, I am inclined to think that the claims of the widow to that much would not be disturbed. And I do not think the doctrine of lapse would enure to the benefit of the residuary legatee so as to give her the whole amount.

The construction given by the Court to the case of lapsed legacies or lapsed appointments falling into the residue (as exhibited in *Falkner v. Butler* (1765), Ambler 514) does not seem warranted in dealing with attempts to change beneficiaries under the Insurance Act. The rule as to lapsed requests falling into the residue is not founded on the intention of the testator, but upon a theory that the residuary clause is intended to embrace everything not otherwise effectually given: *Easum v. Appleford* (1840), 5 My. & Cr. 59, 61.

It rests upon a supposition or hypothesis which should not be employed to take away the vested rights of the existing beneficiary, unless that is explicitly and unmistakeably done by the testator. Here the testator designates so much to his sister,

which fails because contrary to the Insurance Act (sec. 160). He designates the residue to his daughter, which does to that extent take it away from the widow, but I see no propriety or no reason for holding that the widow is also to lose the \$200 ineffectually dealt with by the testator.

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MABEE, J., concurred.

MAGEE, J.: I fully concur in the judgment of my Lord the Chancellor as to the trust in favour of the wife not being disturbed by the will. It is not necessary to enter into the question whether, if it had been, the daughter would be entitled under the bequest of the residue to the \$200 invalidly bequeathed to the sister.

A. H. F. L.

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RE VICTOR VARNISH CO., CLARE'S CLAIM.

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March 23.

*Banks and Banking—Security under sec. 88 of Bank Act—Assignment of—
Payment of Principal Debt by Guarantor—Subrogation.*

A security acquired under section 88 of the Bank Act, R.S.C. 1906, ch. 29, whereby a bank may lend money to manufacturers upon the security of goods manufactured by them is not legally assignable by the bank so as to transfer the special lien or security—conferred by that Act—to a third party. The purpose of the security is satisfied when the debt, it is given to secure, is paid to the bank.

A guarantor to a bank, which also holds such a security for the debt guaranteed, is not subrogated to the rights of the bank in the security on payment of the debt by him.

Judgment of the Master in Ordinary reversed.

THIS was an appeal by the liquidator of the Victor Varnish Co. from the judgment of the Master in Ordinary in so far as it held that the claimant herein, Frank Clare, was entitled to a lien on the stock in trade of the company.

The contestation arose on a claim filed by Clare, who claimed to be a creditor, to the amount of \$5,290, of the company, which was being wound up under the Dominion Winding-up Act, and that he was entitled to a lien on the stock of the company to that amount.

The liquidator admitted that Clare was a creditor to the amount of \$5,125, but disputed the validity of the lien.

The facts, so far as material, are set out in the judgment of FALCONBRIDGE, C.J.K.B.

On December 10th, 1907, the contestation came on before the Master in Ordinary, who at the close of the evidence delivered the following judgment.

THE MASTER IN ORDINARY:—I have very little doubt in regard to what the law is in regard to this. It has long been recognized that where a surety pays the debt of one for whom he is surety to the creditor who holds the claim for the debt and has collateral to it certain securities, that the surety on paying the debt is entitled to an assignment of all the securities which the creditor holds in respect to the claim and debt for which he is surety. That is what is called the doctrine of the law of subrogation, and that law vests in the surety who pays the debt the same rights which the creditor held in respect to the claim for which the party was the surety.

That doctrine was recognized in the statute which I was enabled to induce the Legislature to pass in 1872, and has been re-affirmed and re-enacted in the statutes of Ontario down to R.S.O. 1897 ch. 145, sec. 2, which provides that "every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, pays the debt or performs the duty, shall be entitled to have assigned to him . . . every judgment, specialty or other security which is held by the creditor in respect of such debt or duty whether such judgment, specialty or other security be or be not deemed at law to have been satisfied by the payment of the debt or the performance of the duty. Then sec. 3 provides: "Such person shall be entitled to stand in the place of the creditor, and to use all the remedies, and, if need be, and on proper indemnity, to use the name of the creditor in any action or other proceeding, in order to obtain from the principal debtor, or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who has so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be a defence to such action or other proceeding by him."

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These sections are an amplification of the Act which I referred to as having been introduced by me under the Ontario legislation, 1872, which is ch. 12 of 35 Vict.

The first section of that Act provided that "Every debt and chose in action arising out of contract, shall be assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract; and the assignee thereof, shall sue thereon in his own name in such action, and for such relief as the original holder or assignee of such chose in action would be entitled to sue for in any court of law in this Province."

The doctrine of this clause, I think, is recognized in sec. 80 of the Bank Act, R.S.C. 1906 ch. 29, which provides: "The bank may take, hold and dispose of mortgages and *hypothèques* upon real or personal, immoveable or moveable property, by way of additional security for debts contracted to the bank in the course of its business." You will observe that the words are "take, hold, and dispose of;" that disposal means the disposal of the mortgages or the *hypothèques* or

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the securities which the bank holds upon real or personal estate belonging to the debtor; and therefore, I think, recognized the doctrine of subrogation which is recognized in the original Act of 1872 and in the re-enacted Act, ch. 145, of the Ontario legislation.

I must, therefore, hold that under the doctrine of subrogation the claimant here is entitled to stand in the same position as the bank in respect of the securities which are proved in this matter.

From this judgment there was an appeal to FALCONBRIDGE, C.J.K.B., sitting in the Weekly Court.

G. M. Clark, for the appellant.

J. E. Jones, for the respondent.

March 23. FALCONBRIDGE, C.J.:—Prior to the 31st of January, 1906, the Victor Varnish Co., Limited, was indebted to the Bank of Hamilton, and as security for the indebtedness the bank held a guarantee, dated 13th October, 1905, executed by Frederick Clare and others. Subsequently the company gave to the bank a note for \$5,000, dated the 31st of January, 1906, payable on demand to the order of the bank with interest at six per cent. per annum until paid. This note was secured by an assignment or security under sec. 74 of "The Bank Act," 1890, 53 Vict. ch. 31 (D.) (corresponding to sec. 88 of R.S.C. 1906, ch. 29), and by a collateral agreement bearing the same date. The collateral agreement is not now in question. The assignment or security is in form of schedule "C" to the Bank Act, and is in the following words and figures:

"ASSIGNMENT FOR ADVANCES.

"THE BANK ACT.

"In consideration of an advance of \$5,000 made by the Bank of Hamilton to the Victor Varnish Co., Limited, for which the said bank holds the following bills or notes, made by the Victor Varnish Co., Limited, dated 31st January, 1906, payable on demand at the Bank of Hamilton, Toronto, the goods, wares and merchandise mentioned below are hereby assigned to the said bank as security for the payment on demand of the said advance or of the said bills and notes or renewals thereof, or substitutions therefor, together with interest thereon at the rate of six per cent. per annum, from the ——— day of January, 1906, until finally repaid.

"This security is given under the provisions of sec. 74 of 'The Bank Act,' and is subject to the provisions of the said Act.

"The said goods, wares and merchandise, are now owned by us, and now in our possession, and are free from any mortgage, lien or charge thereon except this assignment of part thereof to the said bank, and are in our premises, 400 Eastern avenue, Toronto, and are the following: All varnish in tanks, turpentine, linseed oil, benzine, methylated spirits, gums, resin, colors, packages, etc., raw and manufactured and in course of manufacture.

"The said stuff is separate from, and will be kept separate and distinguishable from other stuff.

"Dated 31st January, 1906.

"Signature: The Victor Varnish Co., Limited.

"(Sgd.) W. E. L. Hunter, Vice-president.

"(Sgd.) E. J. Stewart, Manager.

"(Seal.)"

In April, 1907, Clare paid the bank the amount of the company's indebtedness, and, at his request, the bank executed the following assignment:

"Frederick Clare, one of the guarantors of the indebtedness of the Victor Varnish Co., Limited, to the Bank of Hamilton, having paid the demand note for \$5,000, dated 31st of January, 1906, made by the Victor Varnish Co., Limited, hereto attached, and having required the bank to assign the said note and all securities held by it, the Bank of Hamilton hereby assigns, transfers and sets over unto the said Frederick Clare all their interest in the said note, assignment for advances, agreement attached and guarantee bond; the said Frederick Clare hereby agreeing and undertaking to indemnify and save harmless the said Bank of Hamilton from all claims, damages, costs and expenses which it may become liable for or incur by reason of this assignment and transfer.

"Dated at Toronto this 25th day of April, 1907.

"Bank of Hamilton,

"Witness:

"Toronto.

"Helen B. McLean.

"(Sgd.) F. E. Kilvert."

The company is now being wound up under the Dominion Winding-up Act. Clare has filed a claim for \$5,290, and claims a

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lien for the said amount upon the stock in trade of the company. The liquidator admits Clare to be a creditor to the amount of \$5,125, but disputes the validity of the lien.

The contestation was tried before the Master in Ordinary on the 10th December, 1907, and at the close of the evidence the learned Master gave judgment declaring Clare entitled to rank as a creditor for \$5,290, and entitled to a lien on the stock of the company, and entitled to all the rights and remedies against the assets that would have been open to the bank before the bank assigned to Clare.

The liquidator appeals from the Master's judgment upon the following, among other grounds:

"3. And because the said Master has found that the said Clare is entitled, in respect of his said security, to stand in the place and stead of the Bank of Hamilton, and is entitled to all of the rights and remedies of the Bank of Hamilton, whereas the said Master should have found that the security in question, being a security created under the Bank Act for the use of banks alone, therefore no private individual should hold the said security, and be thus entitled to the rights of a bank thereunder.

"4. And because the said Master should have found that the security in question, being a bank security under the Bank Act, was not assignable by the said Bank of Hamilton to Clare or any other person not a bank.

"5. And because the said Master should have found that the security in question, not having been registered in any public office as a chattel mortgage, or in any other way, is void as against the liquidator of the said company, and the creditors thereof."

For the sake of convenience I shall cite the sections of the Act as numbered in the Revised Statutes.

The judgment below was apparently based on the supposition that sec. 80 of the Bank Act expressly authorizes the bank to dispose of a security given under sec. 88.

It seems clear, however, that sec. 80 refers only to mortgages and pledges of real and personal property, which a bank may take as *additional* security, notwithstanding the prohibition of sec. 76, and which in the bank's hands are nevertheless subject to the Registry and Chattel Mortgage Acts of the Province in which the goods are situate.

Section 88, which authorizes the bank to take security in the form of that which is in question in this action, contains no provision for the assignment of the security by the bank. It provides that the bank may lend money upon certain goods, wares or merchandise, stock or products, and that the security may be in the form set forth in schedule C to the Act or to the like effect; and that the bank shall by virtue of such security acquire the same rights and powers in respect to the goods, etc., as if it had acquired the same by virtue of a warehouse receipt—i.e., as if it had acquired the goods under sec. 86.

Section 86 provides that “the bank may acquire and hold any warehouse receipt . . . as collateral security for the payment of any debt incurred in its favour, or as security for any liability incurred by it for any person in the course of its banking business”; and that the “warehouse receipt . . . so acquired shall vest in the bank . . . all the right and title to such warehouse receipt and to the goods covered thereby of the previous holder or owner thereof.”

Section 78 has been cited as constituting authority to the bank to sell and assign the security. That section, however, refers to securities taken by the bank under the general powers contained in sec. 76, and does not refer to the special securities authorized by secs. 86 and 88.

Section 89 has also been cited. That section, however, authorizes the bank to “sell the goods” mentioned in the security, and does not authorize the transfer of the security itself. This was pointed out by the late Mr. Justice Robertson in *Peuchen v. Imperial Bank* (1890), 20 O.R. 325, at p. 337.

The Act, as I read it, does not expressly provide that the security may be assigned; but it does not necessarily follow that the document is not assignable in the ordinary sense. It does not, indeed, appear that the assignment has been perfected either under the Judicature Act, or in equity, by notice given prior to the winding-up order; but this is perhaps immaterial, inasmuch as the claimant must succeed, if at all, by virtue of his right of subrogation, and for this purpose no assignment is necessary: *In re M'Myn, Lightbown v. M'Myn* (1886), 33 Ch. D. 575.

The right of subrogation is now governed by the Mercantile Amendment Act, R.S.O. 1897 ch. 145, secs. 2, 3, the originals of

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which were passed in 1872, as pointed out by the Master. The corresponding Act in England is the Mercantile Law Amendment Act, 19 & 20 Vict. ch. 97, sec. 5 (1856).

Mr. Sheldon says (Law of Subrogation, 2nd ed., 1893, sec. 135): "Although it is a general rule that in equity a surety is subrogated to the benefit of all the securities for the debt which the creditor holds against the principal, yet it was finally settled in England that this subrogation must be limited to such securities only as continue to exist and are not *ipso facto* extinguished by the Act of payment: *Copis v. Middleton* (1823), Turner & Russ, 224; and that payment of a bond or other specialty, or of a judgment executed by or recovered against both principal and surety, or the principal alone, extinguished the obligation, so as to prevent any subrogation of the surety thereto: *Jones v. Davids* (1828), 4 Russ 277; *Copis v. Middleton*, *ubi supra*; *Armitage v. Baldwin* (1842), 5 Beav. 278; *Dowbiggen v. Bourne* (1837), 2 Y. & C. Ex. 462; *Hodgson v. Shaw* (1834), 3 My. & K. 183. But the technical reasoning of these decisions, never entirely satisfactory, has now been done away with in England by a statutory provision": (The M.L.A. Act). Compare, also *Regina v. O'Bryan* (1900), 7 Ex. C.R. 19, at p. 25.

If Clare is entitled to the benefit of the security at all, the next question is what is the nature of the security which comes to his hands—*i.e.*, is it the security under sec. 88 of the Bank Act, with the special privileges of not requiring registration and of taking priority as of the time of its delivery as against duly registered documents held by other persons, or is it merely an assignment which in Clare's hands must stand or fall according to the provincial chattel mortgage law?

I do not know of any case directly in point; but in view of the fact that the provisions of sec. 88 infringe upon the policy of provincial law which requires registration, the language of the Act must not be strained so as to confer a priority which is not reasonably necessary to the carrying out of the policy of the Act.

If Parliament had provided for the assignment of the security by the bank, its jurisdiction to do so could not have been questioned. Such a provision would have been legislation in regard to documents taken as security by a bank in the course of the business of banking, within the authority of *Tennant v. Union Bank*, [1894] A.C. 31.

The Act, however, contains no such provision, and although it

is not suggested in the present case that the security was not acquired by Clare in the utmost good faith, I think that to construe the Act as if it provided for the assignment of the security to a third party would open the door so wide to a fraudulent use of the Act that I must decline to construe it as impliedly authorizing that which it does not expressly authorize, or as impliedly authorizing that which, in my view of the matter, is not reasonably necessary to the working of the Act.

I should not omit to mention the case of *Mason v. Great Western R.W. Co.* (1871), 31 U.C.R. 73. The facts of that case are stated in the headnote as follows: "M. & Co., at Guelph, bought a carload of wheat on commission for C. They paid for it themselves, and shipped it by defendants' railway, taking the railway receipt in their own name as consignees. The car was addressed to the care of C. at Waterdown, M. & Co. being aware that it was intended to be ground there for C., and the receipt was indorsed by them to the order of the Canadian Bank of Commerce. Through this bank they drew upon C. at fifteen days' sight for the price, with their commission and bank charges, and discounted the draft with the receipt attached as collateral security. At Waterdown the wheat was delivered by defendants, upon C.'s order to his brother, who had a mill there. It was mixed by him with other wheat and ground, and fifty-five barrels of flour, the equivalent for it, was delivered by him to the defendants for C. C. became insolvent before the draft matured, and M. & Co. took it up and got the railway receipt re-indorsed to them."

In an action by C.'s (Cummer's) assignee against the railway company, it was held that the property in the goods had never passed to Cummer, and therefore could not pass to his assignee, and that consequently the defendants were entitled to set up the rights of M. & Co. (Merton & Co.) as a defence to the action.

Richards, C.J. (with whose judgment Morrison, J., concurred), expressed himself in the following language at p. 91 of the report: "In this view, then, it seems to me none of the parties ever contemplated the wheat was to become the property of F. D. Cummer until it was paid for. It is true, if we apply strictly technical rules to interpret the intention of the parties, and construe the matter so as to make them prevail against the obvious intent of the parties, we may hold that the wheat was bought for and sold to F. D.

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Cummer: that Merton Bros. only had a lien for the purchase money: that when they allowed it to go out of their possession and to be manufactured into flour they lost their lien; when the bill of lading was assigned to the bank on discounting the draft a special lien and property in the wheat passed to the bank under the statute, and when the acceptance for the payment of which the bank had the special lien was paid, the lien of the bank was removed, and Merton Brothers had no claim on the flour, and therefore the assignee of Cummer can claim the property."

In this passage (which is *obiter dictum*) the majority of the Court seemed to recognize that the re-indorsement of the bill of lading to Merton & Co. would not have restored to them the property in the wheat; *i.e.*, the statutory effect of the indorsement does not extend to a third party to whom an indorsement is made by the bank.

Wilson, J., dissented, on the ground that the property in the goods had passed to the insolvent under the contract. At p. 85 he says: "The bank, upon getting the transfer might have acquired rights as to the grain, both against the vendors and vendee of it, which the vendors on a re-transfer or redemption of the property could neither exercise nor possess, though a purchaser from the bank might be able to do so."

The words "purchaser from the bank" obviously mean a purchaser of the goods, not of the security. The first part of the paragraph recognizes that the transfer of the security *by* the bank does not necessarily carry with it the special consequences which the Bank Act confers upon a transfer *to* the Bank: *Cf. Halsted v. Bank of Hamilton*, (1896) 27 O.R. 435, at p. 440.

It was held in *Re Russell, Russell v. Shoolbred* (1885), 29 Ch. D. 254 (see especially pp. 265-6), that the M.L.A. Act applies only to securities which are legally assignable. No doubt the mere document in question here is assignable in so far as it is effectual without the aid of the Bank Act; but in my opinion the special security conferred by the Act is at an end when the document is assigned by the bank to a third party, and such assignment does not in my opinion carry with it any special priority. The purpose of the Bank Act is accomplished when payment to the bank is secured. The special security or priority is not assignable and the M.L.A. Act is therefore inapplicable.

I recognize the force of the argument that the surety cannot be

said really to "stand in the place of" the creditor, unless the security in his hands has the same validity and priority which it possessed when in the hands of the bank.

And in *Re Lord Churchill, Manisty v. Churchill* (1888), 39 Ch. D. 174, North, J., decided that a surety to the Crown who has paid the debt of his deceased principal is entitled to the Crown's priority in the administration of his principal's estate. "It seems to me immaterial," the Judge says at p. 177, "in what way he" (the surety) "got the priority."

I feel bound, however, by the construction put upon the M.L.A. Act by the Court of Appeal in *Re Russell*, supra, and so, with some diffidence, I am of opinion that the liquidator's contention is entitled to prevail.

Appeal allowed *quâ* the declarations of lien and priority; but, considering the novelty of the point and other circumstances, without costs.

G. F. H.

Falconbridge,
C.J.

1908

RE VICTOR
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CLARE'S
CLAIM.

[DIVISIONAL COURT.]

D. C.

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Feb. 17.

IN RE WOODRUFF.

Conviction—Husband and Wife—Proceeding laid under Sec. 244 of Criminal Code—Conviction under Deserted Wives' Maintenance Act—Invalidity—Quashing Conviction.

Where an order was made by two justices of the peace, purporting to act under "The Deserted Wives' Maintenance Act," R.S.O. 1897, ch. 167, whereby the defendant, described as an Indian of the Six Nations, was directed to pay \$1.00 a week for his wife's maintenance; but, it appearing that the information was laid under sec. 242 of the Criminal Code, under which all proceedings were had, and that it was only at the last moment, when the justices were drawing up their minutes of the conviction, that they decided to proceed under the first named Act, without any notice thereof to the defendant, the conviction was quashed.

THIS was a motion to make absolute an order *nisi* to quash an order, dated 13th August, 1907, made by John A. Leitch and George Ballachey, Esquires, justices of the peace for the county of Brant, under the circumstances set out in the judgment.

The motion was heard before MEREDITH, C.J.C.P., ANGLIN, and MABEE, JJ., on February 14, 1908.

J. B. Mackenzie, for the motion.

No one *contra*.

February 17. The judgment of the Court was delivered by MEREDITH, C.J.:—The order purports to be made upon the information of Esther Woodruff, the wife of the applicant, who is described as an Indian of the Six Nations, under the provisions of "The Deserted Wives' Maintenance Act," * R.S.O. 1896, ch. 167, and recites that it appeared that she was entitled to the benefit of that Act, it being the only one for white people and Indians, and the applicant is ordered to pay to his wife one dollar a week commencing on the 20th August, 1907, and to pay the costs of the proceedings.

Various objections are made to the order, but in the view we

* R.S.O. 1897, ch. 166. By section 2 (1) of which two justices if satisfied that the husband of a married woman has deserted her, and if able to maintain her wholly or in part, and has neglected to do so, may make an order that the husband shall pay to his wife such weekly sum not exceeding \$5.00 as they may consider within his means.

take it is not necessary to consider more than one of them, that one being a fatal objection.

The information, which is returned in answer to the *cert orari*, is laid, not under the Act, upon the authority of which the Justices assumed to act, but for an indictable offence under sub-sec. 2 of sec. 242 of the Criminal Code,* R.S.C. 1906, ch. 146, although all the elements necessary to constitute the offence are not set out.

A minute of the conviction appears at the foot of the information, and there is nothing to indicate when or why the Justices determined to treat the complaint as one under the Ontario Act, which is besides for an offence of a very different kind, nor does it appear that the applicant was informed that the Justices were proceeding under the latter Act, but on the contrary it would appear that all the proceedings were taken upon the information that had been laid, and that it was not until they came to draw up the order that it occurred to the Justices to make it under the authority of the Ontario Act.

It is clear upon principle that an order so made cannot stand; but if authority were needed, *Rex v. Dungey* (1901), 2 O.L.R. 223, may be referred to, where the conviction was quashed although the applicant did not make as strong a case as is made by the applicant in this case.

The order must be quashed without costs, and there will be the usual order for the protection of the Justices.

G. F. H.

* R.S.C. 1906 ch. 146, sec. 242 (2) 2. Every one who is under a legal duty to provide necessaries for his wife is criminally responsible for omitting without lawful excuse to do so, if the death of his wife is caused, or if her life is endangered, or her health is, or is likely to be, permanently injured by such omission.

D. C.

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IN RE
WOODRUFF.

Meredith, C.J.

[IN THE COURT OF APPEAL.]

C. A.

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Jan. 9.

March 24.

HINSLEY V. LONDON STREET RAILWAY COMPANY.

*Railways—Accident—Negligence—Contributory Negligence—Non-disposal of—
Questions in Issue—New Trial.*

The deceased, in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and that there was contributory negligence on the plaintiff's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—

Held, Garrow, J., dissenting, that on these findings, the judgment could not be supported, and a new trial was directed.

THIS was an appeal by the defendants from the judgment, at the trial before Meredith, C.J. C.P., and a jury, in favour of the plaintiff.

The action was tried at London, on January 9th, 1907.

G. C. Gibbons, K.C., and *F. F. Harper*, for the plaintiff.

I. F. Hellmuth, K.C., and *C. H. Ivey*, for the defendants.

The action was brought by the plaintiff, as administrator of the estate of Maud Amelia Hinsley, deceased, to recover damages for injuries to her, causing her death, through the alleged negligence of the defendants' servants in the operation of a street car upon the defendants' railway in the city of London.

The deceased, on the 12th September, 1906, was attempting to cross Dundas street, in the city of London, a short distance east of Colborne street, behind one of the defendants' street cars. She had got over the track on which that car was, and had stepped on to the track on which the cars coming in the opposite direction ran, when she fell, and was struck by an approaching car, and was killed.

The additional facts, so far as material, are set out in the judgment of GARROW, J.A.

The questions submitted to the jury, with their answers thereto, were as follows:

1. Were the defendants guilty of negligence? A. Yes.

2. If so, in what did the negligence consist? A. Running at too high rate of speed.

3. Was the plaintiff guilty of contributory negligence? A. Yes.

4. If so, in what did her negligence consist? A. In not taking the necessary precaution before stepping on the north track.

5. Could the motorman, after the condition of danger of the deceased became, or ought to have become, apparent to him, by the exercise of reasonable care, have prevented the accident? A. Yes, if he had been running at a reasonable rate of speed.

6. By whose negligence were the injuries to the deceased which resulted in her death caused? A. The defendants.

They assessed the damages as follows: To the husband, \$500; to the daughters, Florence Adella, six years old, \$1,000; Violet May, a year old, \$1,000.

Upon these findings the learned Chief Justice directed judgment to be entered in favour of the plaintiff. From this judgment the defendants appealed to the Court of Appeal.

On May 10th, 1907, the appeal was heard before Moss, C.J.O., OSLER, GARROW and MACLAREN, JJ.A.

I. F. Hellmuth, K.C., for the appellants.

G. C. Gibbons, K.C., and *G. S. Gibbons*, for the respondent.

The arguments sufficiently appear from the judgments.

March 24. Moss, C.J.O.:—This appeal has been the subject of much discussion and consideration.

In the result I have been unable to bring myself to the conclusion that, upon the answers of the jury, the judgment entered for the plaintiff can be sustained. On the other hand, it is quite clear that the jury did not deal with or dispose of all the questions in issue, and, consequently, the case must go back for another trial upon the whole case.

The difficulty in the plaintiff's way arises from the manner in which the jury answered the fifth question.

There was ample evidence to support the finding in answer to the second question, that the defendants were negligent in running their cars at too high a rate of speed, and, although the

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evidence bearing on the third and fourth questions is not so clear or satisfactory that another jury might not find the other way upon them, it cannot be said that there was not evidence upon which the jury might find, as they did, that the deceased was negligent in not taking the necessary precautions before stepping on the north track. Upon these answers, had the matter rested there, there could have been but one verdict entered, viz., for the defendants.

While, undoubtedly, the defendants were doing a negligent and dangerous act in running their car at too high a rate of speed, that in itself would not have brought about the accident. Another needful element was that the deceased should have got upon the track in front of the car, and this, it is found, she did negligently. She fell as she came upon the track, and the accident became inevitable, but there is also room for the jury to conclude that, even if she had not fallen, she would not have escaped being struck by the swiftly moving car.

If the jury had answered the fifth question by a simple affirmative, it might be held that there was evidence upon which to base it. But the qualification which the jury attached to their answer creates a serious difficulty. Read in the light of the evidence, it indicates an opinion that the motorman, with all his faculties about him, fully apprehending the situation, and doing everything in his power, found it impossible to bring the car to a stop in time to prevent the deceased's death, because the speed of the car was such as to overcome all his efforts in that direction. That may or may not have been the proper conclusion, but I am unable to see that it assists the plaintiff. In what respect does it neutralize or avoid the negligence of the deceased in placing herself in front of the car?

The substance of the findings is that the speed of the car was such that it was impossible for the motorman to avoid a collision with the deceased if she came upon the tracks at the time and place at which she did. Unfortunately, she did come upon it, and the jury say that her act was negligent. If that be the case, then the joint negligence was the cause of the accident. And the further finding, phrased as it is, does not, in my opinion, relieve the plaintiff from the consequences of the deceased's negligence, or justify a verdict in his favour.

I agree that there must be a new trial upon the whole case.

OSLER, J.A.:—I had written a judgment dealing at some length with the various questions argued before us, but it is needless at present to say more than that my conclusion is that the answers of the jury to the questions submitted to them, read in connection with the charge of the learned trial Judge, do not entitle the plaintiff to judgment on the only act or acts of negligence found by them. Another act of negligence in reference to the management of the fender of the car was, however, also relied upon, but the jury were told that they need not consider this if they found for the plaintiff on the other grounds which we now hold not to be tenable, and it was accordingly not passed upon by them. We cannot say that there was not some evidence of negligence in this respect, and therefore there must be a new trial. Costs of the last trial to abide the event. Costs of appeal to the defendant in any event.

I refer to the recent case of *Butterly v. Mayor of Drogheda*, [1907] 2 Ir. R. 134, 150 C.A., where the case of *Reynolds v. Tilling* (1903), 19 Times L.R. 539, is discussed and considered: *Brenner v. Toronto R.W. Co.* (1907), 15 O.L.R. 195; *Brown v. London Street R.W. Co.* (1901), 31 S.C.R. 642, at pp. 651, 652, *per* Davies, J.; *Beven on Negligence*, 3rd ed., vol. 1, p. 179; *Brown v. Northern Ohio Trac'ion Co.* (1907), 10 L.R.A. N.S. 421; *The Bernina* (1887), 12 P.D. 58, at p. 88-9; *Wakelin v. London and South Western R. W. Co.* (1886), 12 App. Cas. 41, 45-6; *Street on the Foundations of Legal Liability*, vol. 1, 139, and *Pollock on Torts*, 7th ed., 457.

GARROW, J.A.:—The acts of negligence alleged in the statement of claim were: (1) excessive and dangerous speed; (2) the deceased fell, and if the motorman had had his car under proper control, and had not been running at too great a rate of speed, he could have stopped the car and prevented the injury; (3) imperfection in the fender; and (4) incompetency of the motorman in the use of the fender.

The defence was a denial of the negligence alleged, and contributory negligence on the part of deceased.

The facts are not in serious dispute.

The deceased, on September 12th, 1906, was crossing Dundas street when she was struck by a car and killed. She had just

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seen her father-in-law off upon an east-bound car, and had passed around the rear end of that car and the trailer attached, and was in the act of crossing the other or north track when she tripped and fell, and was run over by a west-bound car running upon that track.

The evidence as to the distance of the approaching car from deceased when she fell varies from about four feet up to about fifty feet. There was evidence of excessive speed, and that the fender had not been tripped, and that the motorman had not been instructed as to its use.

In his charge the learned Chief Justice, among other things, said to the jury:

"Then comes the next question. Assume that you come to the conclusion that the woman got into a place of danger through her own negligence, still that does not disentitle these plaintiffs to recover if you further find that, after she had got into a position of danger, and that position of danger came to the notice, if he had been vigilant, of the motorman, he, by the exercise of reasonable care, might have avoided the accident. Though the woman might have been negligent, her representatives are, nevertheless, entitled to recover, because the final negligence—the effective negligence—is the omission to discharge the duty to prevent the accident when the danger is apparent and when the means are at hand to prevent it. . . ."

. . . "If they were running at a reckless rate of speed, too high if the woman was not negligent, or if she was negligent even, if they might by the exercise of reasonable care, *had they been going at a reasonable rate*, and had they used the proper appliances, have prevented the accident, then the plaintiff would be entitled to recover." . . .

The charge was objected to by counsel, and this took place:

"*Mr. Hellmuth*: I submit your Lordship should not have told the jury, in regard to the question if the motorman saw or should have seen the danger, and could then have avoided the accident, the defendants would be liable. In your charge in regard to that, your Lordship said that if the car had then been going at a reasonable rate of speed. I submit your Lordship should not have said that.

"*HIS LORDSHIP*: I think if anything, I erred on your side.

"*Mr. Hellmuth*: I submit the original negligence here charged is running at too great a rate of speed.

"*HIS LORDSHIP*: Surely you do not argue that if a man is propelling a car at too high a rate of speed, such a high rate of speed that he cannot use the appliances effectively, he is relieved from the consequences of the rule because the plaintiff alleges negligence in running too fast?

"*Mr. Hellmuth*: I submit that is the result of the *Brown* case. . . . Then I submit that your Lordship should have said that, under the facts in evidence here, the jury were bound to find contributory negligence.

"*HIS LORDSHIP*: I think, if I had been finding, I would find against you on this evidence.

"*Mr. Gibbons* (counsel for the plaintiff): I want to object that there is no evidence of contributory negligence at all on the part of the deceased."

The jury found: (1) that the defendants were guilty of negligence; (2) in running at too high a rate of speed; (3) that the deceased was guilty of contributory negligence; (4) in not taking the necessary precaution before stepping on the north track; (5) that the motorman could, after the condition of danger of deceased became apparent, or might have become apparent, to him, by the exercise of reasonable care, have prevented the accident *if he had been running at a reasonable rate of speed*; (6) that the injuries to the deceased resulting in her death were caused by the negligence of the defendants; and (7) they assessed the damages at, to the husband, \$500; to Florence Adella, \$1,000; and to Violet May, \$1,000; upon which findings judgment was entered for the plaintiff.

I am of the opinion that the charge is not open to *Mr. Hellmuth's* objection. When it was delivered there had, of course, been no findings to complicate the matter. The learned Chief Justice was merely instructing the jury as to what they might find upon the evidence, and one thing they were certainly at liberty to find was that the speed of the car was so unreasonable and excessive as to prevent the motorman from having proper control, and that, had he being going at a reasonable speed and using the appliances at hand, the accident might have been avoided, notwithstanding the negligence of deceased. And, in my opinion,

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that is the proper construction of what the learned Chief Justice said.

The objection of counsel for the plaintiffs, that there was no evidence of contributory negligence, is not, I think, well founded. There certainly was some evidence, although, I think, sufficient attention was not directed to the important circumstance that the deceased fell and was struck by the car while prostrate. If she had not fallen, it may be that she would have crossed in safely, especially if, as some of the witnesses say, the oncoming car was distant about fifty feet. In Toronto people constantly cross with a narrower margin, and if she might have succeeded but for the fall, a jury might reasonably find that her negligence (if any) in making the attempt ceased with the fall.

Mr. Hellmuth, before us, contended that the original negligence found by the jury, namely, excessive speed, could not be made to do duty twice; that it was completely met by the finding of contributory negligence; and that, unless some new act of negligence appeared, the defendants were entitled to succeed; or that, at all events, the findings were contradictory, and a new trial should be ordered. And in support of his first proposition he relied upon the case of *Brown v. London Street R.W. Co.*, 31 S.C.R. 642. But that case is clearly distinguishable by the circumstance that what is here the fifth question, and there the sixth, was answered here in the affirmative and there in the negative.

My chief difficulty has been to understand, and, if possible, harmonize, the several findings of the jury—certainly not an easy, but, I think, a not insuperable, task. And the main difficulty is, of course, created by the finding of contributory negligence.

The questions, I assume, were prepared by the learned Chief Justice, and the construction of the answers was, of course, for him. And, in doing so, he was entitled to have regard to the issues, the undisputed facts, the evidence, and his own charge, as well as to the findings themselves, with the view to producing, if reasonably possible, a harmonious result disposing of the action one way or the other. And in case of obscurity or apparent contradiction, he was, I think, at liberty to disregard the mere order, and even the mere language of the questions and answers,

if the meaning, having regard to all the circumstances, was reasonably clear. So regarding the matter, it appears to me plain, as it must have done to the learned Chief Justice, that the jury intended to find for the plaintiffs. Their findings paraphrased amount, in my opinion, to this: the deceased, in going upon the north track without taking the necessary precautions, was negligent, but the defendant could, after becoming aware of her position and danger, have avoided the accident by the exercise of reasonable care in the control and management of the car. And if this paraphrase is correct, the judgment should stand. Its correctness depends on the view taken of the finding of contributory negligence, for with that finding modified to what I regard, upon the facts, as its proper dimension, all difficulty disappears.

That such a finding is not inviolable is, I think, well established. In the case before referred to of *Brown v. London Street R.W. Co.*, Gwynne, J., evidently considered it to be his duty to examine the facts, as well as the charge to the jury, in order to determine what weight should be attached to a similar finding. And a course similar in principle was adopted, with the apparent approval of the Court of Appeal, by Walton, J., in *Reynolds v. Tilling*, 19 Times L.R. 539, 20 Times L.R. 57; and see also *Butterly v. Mayor of Drogheda*, [1907] 2 Ir. 134.

In the *Brown* case it appeared, and is, indeed, largely the basis of the judgment, that the charge to the jury had properly explained the law as to contributory negligence. The term is not self-explanatory, and under its guise of apparent simplicity is one well calculated to mislead the lay mind. As defined by the authorities, and as known to those learned in the law, it, of course, means negligence continuing as a contributing cause down to the happening of the injurious occurrence: see *The Bernina*, 12 P.D. 58, p. 61, and (1888), 13 App. Cas. 1. But to the unlearned this is apt to be overlooked, and any prior negligent act, however isolated or complete, to be regarded as "contributory."

And if I were to criticize the charge, it would be to say that I fail to find in it an adequate, or, indeed, any, explanation of what in law contributory negligence means, an omission which, in my opinion, goes a long way towards accounting for the apparently contradictory nature of the answers. The jury evidently adopted, without understanding, the language of the third ques-

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tion, to characterize the act of the deceased in going upon the track without taking the necessary precautions, which act might or might not be contributory negligence, according to what view was taken of the undisputed fact that she fell, and of the conflicting evidence as to the distance away from her at that time of the approaching car. If the distance was only four feet, it would be quite reasonable to regard her negligence as continuing, and even as causing the accident, as she must in that case have been struck in any event, even by a car proceeding at a reasonable rate of speed. But if the distance was as great as some of the witnesses deposed to, and a car proceeding at a reasonable rate of speed might, after the position and danger of deceased became apparent, have been stopped in time to avert the collision, a conclusion open to the jury upon the evidence, then the negligence, if any, of the deceased might well have been, as I think it was, regarded as at an end as a contributing cause when she fell, and the excessive rate of speed alone became the final or effective cause. And this view of the facts is the one which apparently commended itself to the jury, to judge by their answers to the fifth and sixth questions, which may, as a matter of construction, under all the circumstances, be safely regarded as having modified the third answer to the extent of eliminating the "contributory" nature of the negligence therein, and in the next answer found. With the result that, I think, the judgment was right, and that the appeal fails.

The alternative would have been a new trial, which, while of some advantage in clearing up what is doubtful, including the question of the fender, which does not appear to have been passed upon, would only, in my opinion, entail large additional costs, with no reasonable prospect of ultimate relief from the claim, which, depending, as it does, upon disputed facts, must in the end be passed upon by a jury, with, as experience proves, as the inevitable, or at least the usual, result of a finding in favour of the plaintiff.

MACLAREN, J.A., concurred with Moss, C.J.O.

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[DIVISIONAL COURT.]

NELLES

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THE WINDSOR, ESSEX AND LAKE SHORE RAPID R.W. CO.

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Feb. 24.

Company—Shares—Transfer on Company's Books—Mandamus to Enforce Transfer—Interlocutory Order.

The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the President; and after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed. An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial.

AN action was brought by Alexander I. Nelles claiming mandamus to compel the defendants to have executed and entered in their stock transfer book the transfer to the plaintiff of two shares of the capital stock of the defendants' company purchased by the plaintiff from one John N. Emery, on the 3rd day of January, 1908; and thereupon a motion for the mandamus was made on affidavits to a Judge in Chambers.

The motion was heard before BRITTON, J., in Chambers, on February 11th, 1908, in whose judgments the facts are stated.

G. J. Leggatt, for the plaintiff.

Matthew Wilson, K.C., for the defendants.

February 24. BRITTON, J.:—Emery held the defendants' certificate, No. 24, for two shares, and the transfer was made by Emery by indorsement upon this certificate.

This certificate, so far as material, is as follows:—

“This certifies that Jno. N. Emery is the owner of two fully paid shares of the capital stock of Windsor, Essex and Lake Shore Rapid Railway Company, transferable only on the books of the corporation

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by the holder hereof in person, or by attorney, upon surrender of this certificate properly indorsed."

It is dated 28th March, 1906. The shares are for \$100 each.

The indorsement is as follows:—

"For value received, I hereby sell, assign and transfer unto Alexander I. Nelles, of Windsor, Ontario, two shares of the capital stock represented by the within certificate; and do hereby irrevocably constitute and appoint the said Alexander I. Nelles my true and lawful attorney to transfer the said stock on the books of the within named corporation, with full power of substitution in the premises."

Dated January 3rd, 1908.

The transfer as indorsed was duly executed, and later on another one was executed but dated the same day and called a duplicate transfer:

On the 4th January the plaintiff took the certificate to the head office of the company at Windsor, and demanded a transfer of these shares, but was informed that none of the officials of the company were then at the office, and the person in charge said he would write to the secretary about the matter.

The plaintiff did not leave the certificate or transfer at the head office of the company.

The plaintiff says that on the 9th January he "tendered the said certificate to the president" of the company, and requested him to have the transfer made; and the plaintiff says that the president peremptorily refused to do so, and when asked for his reason declined to give any.

The defendants' explanation of this, as stated in the affidavit of John Piggott, the president, is that although the plaintiff stated he had purchased two shares of Emery's stock, and that he wished to have them transferred to him, he did not produce or exhibit the certificate or any transfer of the shares, and that as "the stock certificate and transfer book was not there," and as he had never "recorded or entered any transfer of stock, and not supposing it was his duty to do so, without at least being so directed by the board of directors," he said to the plaintiff that he was not then prepared to enter a transfer of the stock, "and the plaintiff turned around and walked out."

The president says he did not intend any unqualified refusal, and he thinks that the plaintiff did not then so understand the language or attitude of the president.

The president states that the defendants have "no desire to overlook the plaintiff's right of transfer of stock, if such right exists, nor to prevent the plaintiff from attending any meeting of the shareholders of the defendants, nor in any other way to refuse the plaintiff his rights in the premises."

The plaintiff then obtained a duplicate of the transfer, so as to comply with the Dominion Railway Act, and placed the matter in the hands of his solicitor to get the necessary transfer on the books of the defendants.

The solicitor of the plaintiff wrote to the secretary of the defendants at Chatham on the 10th January. On the 16th January he wrote to Charles Magee as vice-president, but who was not in fact vice-president. On the 24th January the plaintiff's solicitor enclosed the duplicate transfer to the secretary of the defendants, again addressing him Chatham. On the 24th January the secretary wrote to the plaintiff's solicitor stating his intention to lay the matter before the board of directors at their first meeting. A meeting of defendants' directors was held at Windsor on the 28th January, and a resolution was passed that the secretary notify the plaintiff of the purport of clause 11, sub-clauses d. and e., of the by-laws, and request him to produce evidence of the assignment, and to surrender the old certificate, so that certificate might be prepared and issued in the name of the assignee.

Clause "d," so far as material to the present discussion, is that "no shareholder shall be entitled to receive a second or subsequent certificate until he shall have delivered up to the company all prior certificates received by him from the company for the same stock."

Clause "e," so far as it refers to shares not fully paid, has no reference to the two shares in question. If it is intended by this clause, as to recording, to refer to all shares, it is simply that, "such transfers shall be recorded in a book provided for the purpose, and signed by the shareholder, and his transferee in person or by attorney, and duly witnessed and, if signed by attorney, the power of attorney shall be filed with the secretary."

The plaintiff's solicitor wrote on the 29th January to the secretary, stating that the transfer was sufficient evidence to authorize

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the transfer; that it was all the Act required in the case of paid-up stock; that, in his opinion, the company was "quibbling," and stating that he would attend on the following Friday at noon prepared to surrender the plaintiff's certificate, and complete the transfer. A reply to this letter stated that the members of the board had an important engagement at Chatham on that Friday, but the treasurer promised to take the matter up with a view to having it adjusted in a manner satisfactory to the plaintiff.

On the 4th February the writ herein was issued for the order by way of mandamus.

I am utterly unable to see why any difficulty should have arisen about the transfer of these two shares on the books of the company.

The shares are said to be of little pecuniary value, and that they are at present of any real value to the plaintiff for voting purposes was denied by the defendants' counsel. Why, then, such haste by the plaintiff, and why such hesitancy and dallying on the part of the officers of the defendants? The matter is, however, in court, and each party is standing upon his strict rights. I think the defendants are to blame, and that the plaintiff is entitled to the order asked.

This is not a case of conflicting claims of interest. No person is setting up any claim adversely to the plaintiff, or objecting to the transfer. It is not a question of an equitable assignment against the formal legal one.

The authorities are that "even if a transfer is in order, and if it is accompanied by the certificate, the company are not bound to register it at once." . . . "They are entitled to delay for a reasonable time, and make reasonable inquiry before registration."

In this case the defendants had reasonable time before action by the plaintiff. The plaintiff and his solicitor were known to at least some of the members of the board. Any proper inquiry could have been made within two or three days. The plaintiff's solicitor is a subscribing witness to the duplicate transfer.

There was in my opinion, according to the authorities, a sufficient demand made upon the defendants, and a refusal by them. Although the defendants now say they had no wish to refuse compliance with plaintiff's request, I find a difficulty in determining just what the defendants wanted, and I can only interpret their action and their delay as a refusal.

It was argued that no transfer on the books of the company was really necessary, and therefore an order for mandamus should not issue. *Crawford v. Provincial Ins. Co.* (1859), 8 C.P. 263, at p. 268, was cited as authority for this. That objection is not open to the defendants. They have issued their certificate for shares, which shares they say are only transferable on the books of the company, by the holder in person or by proxy. The plaintiff is entitled to have the terms of that certificate complied with by the defendants.

It was argued for the defendants that no action would lie, but, if it would, the plaintiff must wait until the trial, and get his judgment in the ordinary way.

A mandamus will be granted in an action if the plaintiff shews that he will suffer some injury by waiting for the result of the action. If the plaintiff is entitled to be registered as a shareholder, *prima facie* he will suffer at least a deprivation of his rights in not being allowed to vote on these shares at a meeting of the shareholders to be held before the trial of the action can be had.

If I had come to the conclusion that the action was wrongly brought, and that the plaintiff's relief, if entitled to any, was by getting the prerogative mandamus, I would have followed *Toronto Public Library Board v. City of Toronto* (1900), 19 P.R. 329; and have directed the affidavits to be re-sworn, and the motion turned into a summary one for that order, but I do not come to that conclusion.

The whole law and procedure in regard to mandamus is changed by sec. 58, sub-sec. 9, of the Judicature Act, and by Rules 1080 to 1093 inclusive.

"A mandamus may be granted by an interlocutory order of the Court in all cases in which it shall appear to the Court to be just or convenient that such order should be made": sec. 58, sub-sec. 9.

"An interlocutory order means not merely an order between writ and final judgment, but an order other than final judgment": *Holmested & Langton*, p. 76.

I think it just that the order should be made. There appears to me no reason why the plaintiff should have the completion of the transfer of his two shares of stock delayed.

The order will be for mandamus to the defendants by their proper officers, and in their book of transfer, to record the transfer to the plaintiff, to be executed, transferring the two shares of the

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capital stock of the defendants' company purchased by the plaintiff from the said John N. Emery, and as represented by certificate No. 24, upon the certificate being surrendered by the plaintiff.

From the attitude of the defendants upon the argument it will probab y not be necessary for an order to be taken out, but, if it is, and if there is any difficulty about the terms, the minutes may be spoken to. The plaintiff is entitled to costs, but it is a case in which I should fix the amount, and I do at \$25.

From this judgment there was an appeal to the Divisional Court.

On March 16th, 1908, the appeal was heard before BOYD, C., MAGEE and MABEE, JJ., when the same counsel appeared.

At the conclusion of the argument the judgment of the Court was delivered by BOYD, C.:—The case is not of such extreme urgency as to call for summary action, particularly in the face of conflicting affidavits.

The dispute as to whether there was unreasonable delay will be better disposed of on *vivâ voce* evidence if the case is prosecuted.

There will be judgment allowing the appeal, and vacating the order; costs reserved. If the transfer should be made pending the trial, the question of costs to be disposed of by a Judge in Chambers.

G. F. H.

[MEREDITH, C.J.C.P.]

LAMOND V. GRAND TRUNK R.W. CO.

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Feb. 20.

Railways—Accident to Employee—Watchman at Crossing—Backing Train—Negligence—Liability—Railway Act—R.S.C. 1906, ch. 37, sec. 276.

A watchman of the defendant company at a certain crossing in a city was killed by two cars being "kicked off" in the usual way from a train which was backing in an easterly direction for that purpose. A brakeman with a lamp was on top of the western-most of the two cars, but was not keeping a look-out, and gave no warning that the cars were moving. There was no light on the crossing, nor was any one stationed on the cars "kicked off," to warn people, and the engine bell was ringing:—

Held, that the defendants were guilty of negligence and were liable for his death, not having complied with sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, by stationing a person on the front car to warn people.

Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with. *Canadian Pacific R.W. Co. v. Boisseau* (1902), 32 S.C.R. 424, followed.

THIS was an action for negligence, under Lord Campbell's Act, brought under the circumstances set out in the judgment. The action was tried before MEREDITH, C.J.C.P., sitting without a jury, at London, on January 7th, 1908.

G. C. Gibbons, K.C., and *G. S. Gibbons*, for the plaintiff.

W. Nesbitt, K.C., and *H. C. Pope*, for the defendants.

February 20. MEREDITH, C.J.:—The plaintiff sues under the provisions of R.S.O. 1897, ch. 166, to recover damages for the death of her husband, who was killed on the night of October 14th, 1907, owing, as she alleges, to the negligence of the defendants, and the action is brought for the benefit of the plaintiff and four children of the deceased.

The deceased was a watchman in the employment of the defendants, at the Colborne street crossing of their railway, in the city of London.

According to the testimony of John Farmer, a brakeman in the defendants' service, he last saw the deceased alive a few minutes before his dead body was discovered lying between the rails of a track called the Old Port, and five or six feet from the west side of Colborne street. When seen alive by Farmer, which was when the second shunt, to be afterwards mentioned, was being

Meredith, C.J. made, the deceased was on the sidewalk on the east side of Colborne street, between Taylor's and Walker's tracks, carrying his lamp.

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On this night, which was said not to be very dark, a train crew was engaged in making up a train. John Thompson was the yard foreman, whose duty it was to "line up the switches," which I understand to mean to put them in position for the operation of making up the train. It was also his duty to see that the watchman was at his place on the crossing. The train came from the old Grand Trunk yard, and was then backed eastward, in order to put two cars on the old Port track, west of Colborne street; it was then pulled across Colborne street eastward till the engine, which was at the head of it, was beyond Burwell street, the next intersecting street east of Colborne street; two cars were then backed on to the old Grand Trunk track; after this was done, the train went eastward on that track about 100 feet east of Colborne street; two cars were then kicked off, and ran across Colborne street; the brakeman was on the top of the westerly car, standing about twelve feet from the east end of it; he had a lamp in his hand, and glanced westward, not looking, as he said, for anyone, thinking, as he also said, that it was not his business to look when there was a watchman on the crossing; he made no signal and gave no warning that the cars were in motion, but was on the car apparently for the sole purpose of stopping the cars by the application of the brake when they had gone the distance they were intended to go west of Colborne street; there was no light on the crossing, but there was one on Bathurst street and another on York street, each distant from 150 to 175 feet from the tracks crossing Colborne street; there was no one stationed on either of the cars that were being kicked off, to warn persons, and the engine bell was ringing. When the deceased was found, his head was severed from his body, which had evidently been run over by a car.

It appeared in evidence, also, that a watchman has the right to stop a train; that the space between the tracks was wide enough for the deceased to stand in without danger; that the practice of "kicking off" was a usual one; that the deceased had been a watchman for twenty years; and that sometimes a whistle was sounded to warn the watchman.

It also appeared that the signal that a train is backing is three whistles of the engine, but that it was not usual to give that signal when shunting was going on.

It was also shewn that in discharging his duty the deceased would, from time to time, be called on to cross and re-cross the eight tracks which crossed Colborne street at the point where he was stationed.

It was argued by Mr. Nesbitt that it was impossible, upon the evidence, to determine how the deceased was killed; that it was equally, if not more, consistent with the evidence that he met his death when attempting to cross the tracks in front of the moving cars, having knowledge that they were moving, as that he was surprised by the moving cars and knocked down and run over by them, not being aware that they were moving towards him, and, in support of this contention, reliance was placed upon the position in which his body and his lamp were found.

I am unable to agree with this contention, and am of opinion that I may properly draw the inference that the deceased was knocked down and run over by the two cars which were being kicked across Colborne street in the manner I have detailed, and that the deceased was not aware of the approach of the moving cars.

What I am about to say upon the question of negligence, which is the next question to be considered, also bears upon the question I have dealt with.

The defendants were, I think, guilty of negligence. It was their duty not to subject the deceased, while in the discharge of his duty, to unnecessary danger, and that duty they, in my opinion, failed to discharge.

Although, according to the testimony, there was at the time no other train in movement at the Colborne street crossing except the one I have referred to, and the deceased knew that it was being made up, and although it was his duty to protect from danger from the moving cars persons crossing the tracks, he had a right to rely, as far as his own safety was concerned, upon nothing being done to expose him to unnecessary danger. His duties were not confined to a fixed spot, but he had to cross and recross the tracks, and to be on the look-out for persons intending to

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cross them, in order to protect them from danger from the train or the cars when being moved across the street. The method adopted in shunting the cars, notwithstanding the encomiums bestowed upon it, was, in my view, a dangerous one, and calculated to expose the deceased to unnecessary danger, when it is borne in mind that at the time of the accident the train was headed eastward and 100 feet east of Colborne street, and that the bell was ringing, which, if it indicated anything, indicated that the train was moving eastward. It appears to me that it was a highly dangerous and quite unnecessary thing that the train should be moved backward, so as to push the two cars which were being kicked off across and beyond Colborne street, without any warning whatever as to what was being done. Surely it is not requiring too much of the defendants that, where such an operation is going on, some care at least should be taken to warn those who might be put in danger, of it. The brakeman who stood on top of the westerly car was not in a position to warn anyone, even if he had deemed it his duty to be on the look-out, and why was not the backing signal of three whistles given, or why was not someone stationed on the top of the cars to give warning, or why—and that would have been still better—did not someone walk ahead of the moving cars with a light to give warning of their approach? That appears to have been the course adopted by the yard foreman when lining up the switches, and to have been done by the brakeman in kicking another car across Colborne street after the deceased had been killed. The brakeman said, it is true, that it was his practice to do this only when a coupling was to be made, but I see no reason why it should not be done even where no coupling was to be made.

I find, therefore, that the defendants were negligent in backing the cars across Colborne street in the manner in which that operation was conducted, and that their negligence consisted in failing to give warning of the movement of the cars, especially when the indications from the engine seemed to point to something being done that was not likely to go on while a kicking operation was taking place.

I am unable to find that the deceased was guilty of contributory negligence. Assuming that when he was knocked down he was standing between the rails, which I do not find, that would

not, in the circumstances I have detailed, necessarily disentitle him to recover. Meredith, C.J.

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Mr. Gibbons, besides relying upon the common law duty of the defendants, contended that sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, was applicable, and that, as the defendants had not complied with the requirement of the section by stationing on the westerly of the two cars a person who, in the language of the section, "shall warn persons standing on or crossing or about to cross the track of such railway," the plaintiff was entitled to recover.

Mr. Nesbitt argued the contrary, contending that the section has no application to employees of a railway, and in support of his contention cited *Wallman v. Canadian Pacific R.W. Co.* (1906), 6 Can. R.W. Cases 229, where Mathers, J., expressed doubt as to the applicability of the section to others than the travelling public.

I am unable to find any reason for so restricting the enactment. Its language is wide enough to embrace employees of the railway company while standing on or crossing or about to cross the tracks of the railway. It may be that the primary object Parliament had in mind to accomplish was the safety of the travelling public, but I see no reason why an employee of a railway company should be excluded from the benefit of the protection which the statute was intended to secure to persons on the track or about to cross it, even though only in the discharge of their duty as employees.

Canadian Pacific R.W. Co. v. Boisseau (1902), 32 S.C.R. 424, was cited by Mr. Gibbons as having determined this question in accordance with his contention.

Section 260—the section then in force—is not referred to in the reported judgment of the Supreme Court, but it appears from the report of the case in the Court below, (1902), 11 Quebec Official Reports 394, that it was relied on by the plaintiff.

The husband of the plaintiff was a conductor in the employment of the defendants, and was struck by a train moving backwards in the yard of the Windsor station of the defendants, and instantly killed, and the absence of a light or a man on the rear of the train to warn persons standing on or crossing the track of the railway was relied on to support the plaintiff's claim. The

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trial Judge (Langelier, J.) held the section to be applicable, and, on appeal to the Court of King's Bench, Ouimet, J., was of the same opinion, and the Chief Justice (Lacoste) was of opinion that sec. 260 is applicable to movements of a train at a station where the public is admitted, and stated that he meant by station all the space occupied by the platforms where the passengers embark or disembark, and where the public has access, and not merely the building called the shed (*la remise*).

In delivering the judgment of the Supreme Court, the Chief Justice said:—

"I adopt in its entirety the opinion expressed in the Court below by Chief Justice Lacoste."

Unless, therefore, the section as amended by the Act of 1903, and as it appears in the Revised Statutes as sec. 276, has been so altered as to require that a different construction be put upon it, the *Boisseau* case governs, and sustains the position taken by Mr. Gibbons.

Section 260 reads as follows:—

"Whenever any train of cars is moving reversely in any city, town or village, the locomotive and tender being in the rear of such train, the company shall station on the last car in the train a person who shall warn persons standing on or crossing the track of such railway of the approach of such engine, tender and train, and for every violation . . ."

Section 276 of the Revised Statute reads as follows:—

"Whenever in any city, town or village, any train is passing over or along a highway at rail level, and is not headed by an engine moving forward in the ordinary manner, the company shall station on that part of the train, or of the tender, if that is in front, which is then proceeding foremost, a person who shall warn persons standing on, or crossing, or about to cross the track of such railway."

The only change effected by the amendment is that the duty which the section casts upon the company now rests upon it only when a train is passing over or along a highway at rail level, while by sec. 260 the duty was imposed whenever the train is moving reversely, without any expressed limitation as to place, except that of its being within a city, town or village.

If under the earlier legislation the duty was owed to an em-

ployee of the company while engaged in the performance of his duty at a station where passengers embark or disembark and where the public have access, there is no reason, I think, why, notwithstanding the change in the section, the duty imposed by it is not owed to an employee while engaged in the performance of his duty, and who is injured by a train crossing a highway, where he is "standing on a crossing or about to cross the track of the railway," and the *ratio decidendi* of the *Boisseau* case is, in my opinion, as applicable to sec. 276 as it was to former sec. 260.

Bennett v. Grand Trunk R.W. Co. (1883), 3 O.R. 446, is a decision in the same line as that in the *Boisseau* case as to the duty imposed by sec. 260 extending to the station grounds of a railway company.

The plaintiff is, I think, entitled to recover. The children having sustained no pecuniary damage, I have only to assess the damages to which the plaintiff is entitled. The deceased was sixty-five years old and his wife sixty-three; his wages were \$1.10 a day, Sundays and holidays included, and his expectation of life was eleven years. Nine hundred dollars seems to me a reasonable sum at which to assess the damages, and I, therefore, give judgment for the plaintiff for that sum with costs.

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[IN THE COURT OF APPEAL.]

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THE H. H. VIVIAN COMPANY, LIMITED, v. CLERGUE.

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April 21.

Sale of Land—Payment of Purchase Money by Instalments—Conveyance on Payment of Fixed Portion of Purchase Money—Right to Sue for Instalments without Tender of Conveyance.

Where by an agreement for the sale of land the purchase money is payable by instalments without interest, and on payment of a fixed portion of the purchase money, the purchaser is to have a conveyance, he giving back a mortgage for the balance due, the vendor is entitled to recover the instalments falling due within such limit, without the tender of a deed to the purchaser.

Where an agreement for the sale and purchase of land is made with the purchaser, "or assigns," the former is not relieved from his obligation under the contract by assigning it unless the vendor has accepted the assignee in place of the purchaser.

Judgment of the Divisional Court, 15 O.L.R. 280, affirmed.

THIS was an appeal by the defendant from the judgment of the Divisional Court, affirming the judgment of Britton, J., at the trial, both reported 15 O.L.R. 280. The facts, so far as material, are set out therein, and in the judgment of Moss, C.J.O.

On November 5th, 1907, the appeal was heard before Moss, C.J.O., OSLER, GARROW and MACLAREN, JJ.A., and TEETZEL, J.

W. E. Middleton, K.C., for the appellant. This case has been treated as if it were one of independent covenants. This is not the effect of the agreement. By its terms the plaintiffs are to convey the lands, and the defendant to pay the purchase price. The one is dependent on the other. The plaintiffs cannot have both the land and the purchase money. This was the principle laid down in *Pordage v. Cole* (1670), Wm. Saund. ed. 1871, vol. 1, p. 548, vol. 2, p. 742 note, and *Laird v. Pim* (1841), 7 M. & W. 474; *East London Union v. Metropolitan R. W. Co.* (1869), L. R. 4 Ex. 309, and it is recognized and adopted as the law in the text books: Dart on Vendors and Purchasers, 7th ed., 999; Sugden on Vendors, 14th ed., 239-40. It has also been so dealt with by the Courts of this Province: *Fraser v. Ryan* (1897), 24 A.R. 441; *Thomas v. Ross* (1860), 19 U.C.R. 370. By the terms of the agreement the defendant's liability was to cease on his obtaining an assignee. He procured the Standard Mining

Company, whom the plaintiffs accepted, and so his liability was at an end. If this should not be held to be the effect of the agreement, it did not carry out the intention of the parties, and it should be reformed. The plaintiffs, moreover, elected to cancel the agreement by bringing an action to recover damages. The plaintiffs are not without remedy, if they have sustained any loss, for they can bring an action to recover any damages sustained.

W. M. Douglas, *K. C.*, and *A. H. F. Lefroy*, for the respondents. Whether or not the payment of the purchase money is to be conditional on the delivery of the conveyance, depends on the intention of the parties as apparent from the terms of the agreement. Under the agreement here, the defendant is not entitled to call for a conveyance until he has paid three-fifths of the purchase money. The instalments sued for are within such three-fifths, and the plaintiffs are, therefore, entitled to recover them. The defendant entered into the possession of the property, and had the full benefit of it. The law is fully discussed and the cases collected in *McDonald v. Murray* (1885) 11 A.R. 101; see also *Armstrong v. Auger* (1891), 21 O.R. 98. In the cases relied on by the defendant it is quite clear that the payment of the purchase money was dependent on the delivery of the conveyance. The rule, governing a case like this, is laid down in *Norton on Deeds*, 2nd ed., page 524, that where a day is appointed for the payment of money or part of it, and the day is to happen before the thing which is the consideration for the money is to be performed, an action may be brought for the money. See also *Dart on Vendors and Purchasers*, 7th ed., vol. 2, p. 1001. Then as to the defendant being relieved from liability. All that was intended, and all that was provided for, was that the plaintiffs might, on an assignee acceptable to them being obtained and agreed to, accept him in the place of the defendant; but there is nothing in the agreement compelling them to do so. The plaintiffs never accepted the proposed assignee, and the transaction fell through. The defendant's liability, moreover, attached before the alleged assignment was made. There was no mutual mistake, and nothing on which reformation could be based. As to the

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plaintiffs having elected to abandon the contract by suing for damages, this is displaced by the evidence.

W. E. Middleton, K.C., in reply. The fact of the defendant having entered into possession is of no importance. This is laid down in the case already referred to of *Thomas v. Ross*, where Robinson, C.J., says you must shew an actual conveyance of the land; the mere act of giving possession is not sufficient.

April 21. The judgment of the Court was delivered by Moss, C. J. O.:—The plaintiffs brought the action to recover from the defendant payment of two sums of money, being instalments of purchase money of certain mining lands, which, under the terms of an agreement in writing entered into between the plaintiffs and defendant, were to be paid on the 23rd of June, 1904 and 1905, respectively, together with interest on the whole sum payable under the agreement. Britton, J., gave judgment for payment only of the instalment falling due on the 23rd of June, 1904, with interest, and of this the plaintiffs do not complain.

The facts are not really in dispute. The substance of the agreement is set forth in the judgment of the trial Judge, reported 15 O.L.R. 280.

The defendant claims judgment in his favour on three grounds: First, that it is a term of the agreement that he was to be relieved of liability for the payments if he procured a company or individuals to accept the contract and become purchasers in his place—which he subsequently did—and that if the writing is not to be so construed, it is contrary to the true agreement and understanding of the parties and should be reformed; secondly, that the plaintiffs, before the commencement of this action, elected to cancel the agreement, and are therefore not entitled to maintain this action; and, lastly, that, even if the agreement is to stand, the plaintiffs are only entitled to recover damages for breach of the contract, and are not entitled to recover the instalments of purchase money.

Dealing with these in the order stated, there is nothing in the language of the agreement to give countenance to the contention that, in the event of the assumption of the contract by other parties, the defendant was to be relieved.

The only thing appearing to shew that an assignment was at all in the contemplation of the parties is the fact that the written offer to sell is addressed to "F. H. Clergue or assigns," and that the defendant's acceptance thereof purports to be "on behalf of myself or assigns." These words probably do not extend the operation of the agreement beyond what it would possess without them. They amount to nothing more than saying that if the defendant cared to assign the benefit of the contract, no objection would be made to his doing so, provided the assignee was acceptable to the plaintiffs. They fall far short of an agreement to relieve the defendant from liability to pay according to the terms of the agreement. If that had been intended, one would naturally have expected to see some provision for protecting the plaintiffs from a transfer to a person of no substance, or some stipulation as to the terms on which the assignee was to be accepted in the defendant's stead. There is an entire absence of words, apt or otherwise, binding the plaintiffs to accept an assignee and relieve the defendant except upon their own terms.

Nor does the evidence, oral or documentary, establish a case for reforming the writing. The defendant does not depose to any agreement that he was to be relieved upon procuring an assignee. All he can say, and does say, is that when Mr. Eden, the plaintiffs' agent, brought the offer to sell to him, for his signature, it did not contain the word "assigns," and "I said to Mr. Eden that I proposed to assign the contract to a company to carry on the business, and I wanted the word 'assigns' put in." Q. "What did he say to that? A. He put it in."

The defendant then signed the acceptance "on behalf of himself or assigns," and this was all that took place on that subject.

The agent's testimony distinctly negatives any agreement of that nature. There was a discussion as to the extent of the payments to be made in case mining operations were carried on and ore extracted by a company to which the defendant might assign, and it was arranged that in that case the payments would be increased according to a scale based on the ore production. On the 23rd of June, 1903, the day the agreement was signed, the plaintiffs' agent wrote the defendant setting forth this supplementary agreement, and asking for an acknowledgment and confirmation. On the 14th of July the defendant wrote that the

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proposal stated in the agent's letter was entirely in accordance with their conversation, and that the purpose of his letter was to ratify their understanding, setting it forth as stated in the agent's letter.

If there had been any agreement that the defendant was to be relieved, one would suppose that it would have been also stated in this correspondence, or that, if the failure of the agent to refer to it was an omission on his part, the defendant would have drawn attention to it. The silence in this correspondence as to any such agreement is cogent evidence that nothing of the kind had taken place. Reference is made to the correspondence which subsequently took place between the plaintiffs' solicitor and others, but it does not go to prove the making of an agreement prior to the signing of the writing, and this is what is necessary to be done in order to have the agreement reformed. The subsequent correspondence could not do what the defendant, who himself made the agreement sued on, was unable to swear had been done. At most the correspondence only amounts to a willingness to relieve the defendant from liability for payments falling due after there had been a substitution in a binding manner of another purchaser. But as to amounts that were payable before that time, the plaintiffs' position always was that the defendant must make them if they were not paid otherwise. No case for reformation has been shewn, and the agreement is binding on the defendant according to its terms, unless he is to be relieved on the other grounds. He is, of course, relieved to the extent stated by the learned trial Judge by the substitution of the Standard Mining Company of Algoma, under the agreement of the 10th of March, 1905.

Next, as to the objection that the plaintiffs elected to cancel the agreement. This is founded upon the fact that the plaintiffs, on the 27th of January, 1904, issued a writ of summons against the defendants, claiming "damages for breach of contract," which was subsequently discontinued. The claim is so vague and indefinite that without more it cannot be held to be connected with the agreement in question. The evidence given makes it quite plain that it was not intended as a move to cancel the agreement, but was for the purpose of enforcing some of its terms, and the

claim on which it was founded was settled by the defendant as part of the terms of a judgment in an action to recover the amount of the promissory note which he had given the plaintiffs for part of the first payment under the agreement. This evidence utterly displaces any idea of intention to cancel it.

Then, as to the objection that the plaintiffs cannot recover the instalment of purchase money, but are confined to damages for breach of the contract. The whole purchase money payable under the agreement was \$125,000, payable \$500 on the signing of the agreement, which was paid, \$4,500 on the day of completion of the purchase, which was fixed at the 15th of July, 1903, but was extended for four months on the defendant giving his promissory note for the amount (which was afterwards paid) and the remainder in five annual instalments of \$24,000 each, with the privilege of paying off the whole or any part remaining unpaid at any time before the dates fixed. Completion of the purchase meant, of course, the investigation and acceptance of the title upon which the \$4,500 was to be paid and the defendant let into possession.

The agreement further provides that so soon as three-fifths of the total purchase money, together with all interest then due, is paid, the defendant is to be entitled to call for transfers of the land upon a good and sufficient first charge or mortgage upon the whole of the lands, being executed to the plaintiffs to secure payment of the balance of the purchase money and interest.

Immediately after the execution of the agreement, the defendant went into possession of the lands, and has remained in possession ever since, but until \$75,000 and interest has been paid he is not entitled to call for a conveyance. The agreement with the Standard Mining Company provides that until sums amounting to \$10,000 have been paid they shall not be entitled to possession. There is no question as to the plaintiffs' title.

These facts quite distinguish the case from *Laird v. Pim*, 7 M. & W. 474, and the many other cases cited for the defendant.

In *McDonald v. Murray* (1885), 2 O.R. 573, and in appeal, 11 A.R. 101, the cases up to that time are collected and commented on, but there is nothing in the decision in appeal or the cases relied upon by the learned Judges, who differed from

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the Judges of the Divisional Court, that conflicts with the view taken by the learned trial Judge in this case.

The decision in appeal turned upon the construction placed by the majority of the Court upon the terms of the agreement in question.

But it was not denied that it was competent for a vendor and purchaser of lands to agree for payment by the purchaser of instalments of the purchase money or of the whole amount prior to the time fixed for the conveyance to be made by the vendor, and that in such case the vendor might recover the amount of the purchase money so agreed to be paid without making or tendering a conveyance. In other words, that while the general rule is that the mutual engagements of the parties are to be considered dependent on each other, the contract may be so worded as to shew that the mutual obligations were to a certain extent independent.

The question is to be determined by the intention and meaning of the parties as manifested in the instrument, and by the application of common sense to each particular case; to which intention, when once discovered, all technical forms of expression must give way: *Stavers v. Curling* (1836), 3 Bing. N.C. 355, *per* Tindal, C.J., at p. 368.

In the present case the intention and meaning of the parties are quite manifest. The defendant is to pay three-fifths of the purchase money and all interest due before he can call upon the plaintiffs to make a conveyance. The case is brought precisely within the first rule stated in the notes to *Pordage v. Cole*, 1 Wms. Saund. 320, note 4 (p. 551, ed. of 1871).

The substance of the rule, as applicable to this case, is that where a day is appointed for payment of money or part of it, and the day is to happen before the thing which is the consideration of the money is to be performed, an action may be brought for the money: see the whole rule stated in Norton on Deeds, 2nd ed., p. 524 *et seq.*

The case of *Yates v. Gardiner* (1851), 20 L.J. Ex. 327, though turning to some extent on a question as to the Statute of Limitations, is valuable as shewing the clear distinction between such a case and *Laird v. Pim*.

Parke, B., said, at p. 328: "The defendant in this case agrees

to pay the purchase money of the land on the 1st of January without a conveyance; he is, therefore, bound to pay it, and a tender of a conveyance need not be averred. The case differs from *Laird v. Pim* inasmuch as in that case the money was not to be paid until the conveyance was completed, but here the defendant agrees to pay in advance, and relies upon the plaintiff afterwards giving him a conveyance."

This seems to be the situation of the defendant in this case. And it is no hardship upon him to require him to perform the terms of his agreement. With his assent, the benefit of the agreement is now vested in the Standard Mining Company, subject to the question which has been determined in this action. If he now pays the amount he is found liable for, and is not repaid by the Standard Mining Company, he is not without remedy, for he acquires a lien upon the company's interest in the land to the extent of his payment: *Rose v. Watson* (1864), 10 H.L.C. 672.

The appeal should be dismissed with costs.

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[CLUTE, J.]

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IN RE JOYCE AND THE TOWNSHIP OF PITTSBURG.

March 28.

Intoxicating Liquors—Local Option By-law—Deputy Returning Officer and Poll Clerks—Right to Vote and Take Oath—By-law Passed Before Expiration of Two Weeks for Scrutiny—Subsequent Passing.

Section 141 of the Liquor License Act, R.S.O. 1897, ch. 245, enacts that the council of every township may pass a prohibitory by-law, known as a local option by-law, provided that before the final passing thereof it has been duly approved of by the electors in the manner provided by the section of the Municipal Act in that behalf:—

Held, that the fact that such a by-law was read a third time before the expiration of the two weeks allowed for a scrutiny was immaterial, where, after such two weeks, and within the time limited for its passing, the by-law was read and finally passed.

Deputy returning and poll clerks are entitled to vote on such by-laws, under sec. 347 of the Municipal Act, and can properly take the oath, which may be required to be taken by persons claiming to vote thereon.

Re Local Option By-law of Township of Saltfleet, ante p. 293, followed.
Re Armour and Township of Onondaga, 14 O.L.R. 606, not followed.

THIS was an application to quash a by-law of the municipality of the township of Pittsburg, known as a local option by-law, prohibiting the sale of liquor in the township.

The application was heard before CLUTE, J., sitting in the Weekly Court, on 25th March, 1908, in whose judgment the grounds for the application appear.

T. J. Rigney, for the applicant.

J. L. Whiting, K.C., for the respondent.

March 28. CLUTE, J.:—It was conceded on the argument by counsel for the respondent that if the poll-clerks and deputy returning officers had no right to vote, then there was not a three-fifths majority of voters in favour of the by-law.

Section 351 of the Consolidated Municipal Act, 1903, 3 Edw.VII. ch. 19 (O.), which refers to the manner of voting on by-laws, provides that secs. 138 to 206 inclusive, except sec. 179, in so far as they are applicable, and except so far as therein otherwise provided, shall apply to the taking of votes at the polls and to all matters incidental thereto. It is urged on behalf of the applicant that inasmuch as sec. 179 is thus expressly excluded, and as sub-sec. 3 of that section provides that all deputy returning officers and persons employed as deputy returning officers and poll-clerks, shall, if other-

wise qualified, be entitled to vote, it thus appears that it was intended in a case of this kind that deputy returning officers and poll-clerks should not vote. Eliminating this section, who are entitled to vote on a by-law of this kind? For if it appears that deputy returning officers and poll-clerks are given the right to vote without reference to sec. 179, then it would seem to follow that this section, although excluded by sec. 351, does not thereby deprive such persons of the right to vote.

Under the Liquor License Act, R.S.O. 1897, ch. 245, sec. 141, it is provided that the council of every township may pass a prohibitory by-law, provided that the by-law before the final passing thereof has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. Section 86 of the Municipal Act gives the qualification of electors; sec. 89 provides that the elector must be named in the voters' list, and sec. 148 provides for the list of voters to be used at an election; sec. 347 provides that deputy returning officers, poll-clerks, and agents may vote at the polling place where they are employed, and sec. 163 provides for certificates to enable them to vote where stationed; sec. 351 expressly includes sec. 148. This gives a list of voters who are entitled to vote. Section 351 has reference to the clerk of the municipality giving the casting vote, which is obviously unnecessary where a three-fifths majority is required.

Inasmuch as sec. 347 expressly provides how deputy returning officers and poll-clerks may vote on by-laws, I am of opinion that they were entitled to vote on the by-law in question, and in the conflict of authority so hold: *Re Local Option By-law of Township of Saltfleet*, ante 293; *Re Armour and Township of Onondaga* (1907), 14 O.L.R. 606, 610; *Re Duncan and Town of Midland*, ante p. 132.

It was further objected that the deputy returning officers and poll-clerks were not entitled to vote, because they could not properly take the oath which may be required of a person claiming to vote. See secs. 112, 113, 114 and 115.

The oath which it is suggested would apply is as follows: "That you have not received anything, nor has anything been promised you, either directly or indirectly, either to induce you to vote at this election, or for loss of time, travelling expenses, hire of team, or any other source connected with this election;" and it is contended that

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inasmuch as poll-clerks and deputy returning officers would receive pay for their services as such, this precludes them from voting.

In the first place I do not think that this oath has reference to services of that kind; again, if this is a prohibition against deputy returning officers and poll-clerks in the present case, it would equally be so in municipal elections, where they have an undoubted right to vote.

The only other point argued before me was that the by-law had received its third reading before the scrutiny was completed, and that the present application was made in respect of that by-law. It was admitted, however, that a third reading had been given to the by-law after the scrutiny and within the time provided by the Act. I do not think I can give effect to this objection. If the first reading of the by-law was not effective, the last reading was: *Re Duncan and Town of Midland*, ante p. 132.

The application should be dismissed with costs.

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[ANGLIN, J.]

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April 16.

LONDON AND WESTERN TRUSTS CO. V. TRADERS BANK OF CANADA.

Executors and Administrators—Letters of Administration—Issue of Letters Out to Improper Surrogate Court—Validity—Surrogate Courts Act.

Where letters probate or of administration have issued out of a Court from which they could not properly issue under the Surrogate Courts Act, R.S.O. 1897, ch. 59, sec. 19, they are nevertheless valid unless and until revoked.

THIS was an action by the administrators of the estate of William A. Fraser, deceased, for the recovery of money on deposit with the defendants under the circumstances mentioned in the judgment.

The action was tried before ANGLIN, J., sitting without a jury, at Sarnia, on April 9th, 1908.

D. S. McMillan, for the plaintiffs.

R. J. Towers, for the defendants.

April 16. ANGLIN, J.:—The plaintiffs sue, as administrators of the estate of William A. Fraser, deceased, to recover the sum of

\$1,606 deposited by him in his lifetime in the savings bank department of the defendants' agency at the village of Embro, in the county of Oxford. The defendants admit the deposit of the money by the deceased Fraser, but allege that the deposit was in trust for himself and his wife, Margaret Fraser, jointly, and with power to either to withdraw the money from the bank; that Margaret Fraser was legally entitled to payment of the moneys, and that the defendants paid the same to her on the 19th of November, 1907. In the alternative, the defendants allege that these moneys were the subject of a *donatio mortis causa* from Fraser to his wife, which entitled her to receive the same from the defendants. The defendants further plead that the plaintiffs have not been lawfully appointed as administrators of the estate of William A. Fraser, deceased.

It was established before me that the moneys in question were deposited by William A. Fraser, deceased, in his own name, in the defendants' bank at Embro, on November 1st, 1907. There was no evidence adduced before me of any trust of the said moneys for Fraser and his wife, as alleged by the defendants, or of any *donatio mortis causa* of the said moneys in favour of the wife of the deceased. The defence pressed at the trial was that affecting the validity of the grant of administration to the plaintiffs. The material facts upon this branch of the case are as follows:—

William A. Fraser, deceased, was domiciled at Port Huron, in the State of Michigan. He died at Embro, in the county of Oxford. At the time of his death he possessed property at Embro, and also in the county of Bruce, but not elsewhere in the Province of Ontario. Application for letters of administration was made by the plaintiffs to the surrogate court of the county of Lambton. The material filed in support of the application for administration did not shew property of the deceased in the county of Lambton, but did shew assets in the county of Oxford in this Province, and also shewed that the deceased was domiciled at Port Huron, in the State of Michigan, and that the place of his death was at Embro, in the county of Oxford. The applicants stated that they had been requested to take out letters of administration, but the material did not shew by whom such request was made, or at whose instance they made application.

William A. Fraser died on November 13th, 1907, and on No-

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vember 19th the defendants paid over to his widow, Margaret Fraser, upon her demand, the sum of \$1,606 standing to the credit of the deceased. Letters of administration issued to the plaintiffs out of the surrogate court of Lambton on February 14th, 1908. The deceased appears to have left no relatives in this Province. At all events, none of his relatives were cited in the surrogate court, and no notice of the application for administration was given to his widow.

The defendants rely upon the provisions of sec. 19* of the Surrogate Courts Act, R.S.O. 1897, ch. 59, as establishing that jurisdiction to grant administration to this estate belonged either to the surrogate court of the county of Oxford, or to that of the county of Bruce, which were the only counties in this Province within which the testator left property.

If the surrogate court of Lambton had jurisdiction to grant administration, though the grant may have been irregularly obtained and improvidently issued, the defendants could not in this action contest the validity of the letters: *Book v. Book* (1887), 15 O.R. 119. See, too, *McPherson v. Irvine* (1895), 26 O.R. 438. But the defendants maintain that there was no jurisdiction in the surrogate court of the county of Lambton to grant administration. Section 21 of the Surrogate Courts Act, however, provides that "probate or letters of administration by whatever Court granted shall, unless revoked, have effect over property of the deceased in all parts of Ontario, subject to limitation under sec. 61 of this Act, or otherwise." This section, following the sections of the statute defining the jurisdiction of the several surrogate courts, is obviously intended to cover a case in which probate or letters of administration shall have issued out of a Court from which they could not properly issue under the provisions of the Surrogate Courts Act. Its effect was considered by Mr. Justice Osler in *Jennings v. Grand Trunk R.W. Co.* (1887), 15 A.R. 477. The learned Judge

* R.S.O. 1897, ch. 59, sec. 19:—

(1) The grant of probate or letters of administration shall belong to the surrogate court for the county in which the testator or intestate had at the time of his death his fixed place of abode.

(2) If the testator or intestate had no fixed place of abode in, or resided out of, Ontario at the time of his death, the grant may be made by the surrogate court for any county in which the testator or intestate had property at the time of his death.

(3) In other cases the grant of probate or letters of administration shall belong to the surrogate court of any county.

points out, at pp. 482-3, that in the case of a grant of administration to the estate of a person not resident in the Province who died within the Province, leaving property at the place of his death but not elsewhere in Ontario, the grant of probate or administration by the surrogate court of a county in Ontario, other than that in which the deceased died, would have effect over the personal estate of the deceased in all parts of Ontario until and unless revoked. Although proceedings are now pending in the surrogate court of Lambton to revoke the grant of letters to the plaintiffs, there has, as yet, been no revocation. In these circumstances the letters must be treated as valid at present, and the defence based upon their invalidity consequently fails.

There must, therefore, be judgment for the plaintiffs for the sum of \$1,606, with interest from February 14th, 1908 (the date of the issue of the writ in this action), at 5 per cent. per annum. The plaintiffs are entitled also to their costs of the action, including costs of the motion to postpone unsuccessfully made by the defendants.

In view, however, of the pending application to revoke the letters of administration granted to the plaintiffs, the defendants may satisfy this judgment by paying to the plaintiffs their costs, after taxation, and paying into court the sum of \$1,606 with interest. Should the defendants pay this sum into court, in the event of the application to revoke the letters of administration resulting in the grant to the plaintiffs being finally upheld, the moneys in court may thereupon be paid out to them without further order. But should the grant of letters to the plaintiffs be revoked, the moneys in court will not be paid out to any party without notice being first given to the defendants.

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[IN THE COURT OF APPEAL]

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IRVING V. THE GRIMSBY PARK CO., LIMITED.

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Company—Acquisition of Land for Camp Grounds—Sub-division into Lots and Streets—Act Authorizing Imposition of Admission Fee—Lease of Lots—Right of Access—Admission Fee—Liability of Lessee.

Under Letters Patent issued in 1875 incorporating the defendants, power was conferred to acquire a tract of land and to improve, sell or otherwise dispose of same in lots, plots or parcels as the by-laws might provide, which the defendants did, and by plans duly registered sub-divided it into lots with streets or avenues giving access to the lots. By sec. 6 of 47 Vict. ch. 83 (O.), the company were authorized to impose and collect an admission fee from any person seeking an entrance into "the premises occupied by the company" and those claiming under them; but such payment was not to prevent the company from excluding or ejecting any person from the premises for disorderly conduct. In 1835 by a lease under the Short Forms Act, the company leased two of the lots for 999 years subject to the letters patent and the company's by-laws then or thereafter to be enacted, the lease containing a covenant by the lessee, on behalf of herself and her assigns, to at all times during the term to observe, keep and perform all such by-laws, etc., there being also a covenant by the company for quiet enjoyment. In 1889 the lease was assigned to the plaintiff. In 1902 a gate was placed at the entrance to the grounds, and a by-law passed requiring an admission fee or toll to be paid by all persons seeking admission to the grounds, under which the company claimed the right to demand payment thereof from the plaintiff and each adult member of his family, and by-laws were subsequently passed in 1904, 1906 and 1907 raising the amount of the fee:—

Held, that the plaintiff, by virtue of the lease, was entitled to the reasonable use of the roads, streets and avenues leading to his premises for access thereto, and though it was doubtless intended that the lessee personally, if not his lands, should be subject to some control by means of by-laws, and to charges for certain services, the power to regulate such services did not carry with it the right to impose an admission fee with the corresponding right to exclude for non-payment, etc.; and that section 6 of the Act was applicable to those, such as casual visitors, who merely sought an entrance to the defendants' premises or through them to the premises of others, and not to a person such as the lessee who sought an entrance to the grounds for the purpose of reaching his own premises: Maclaren and Meredith, J.J.A., dissenting.

Judgment of Mulock, C.J., Ex.D., at the trial, affirmed.

THIS was an appeal from the judgment of Mulock, C.J. Ex.D., at the trial in favour of the plaintiff.

The action was brought by the plaintiff, as the assignee of a lease granted to Mrs. Margaret Jones, claiming to have his rights, under the lease declared; claiming that he was entitled to the demised premises without payment of any entrance fee to the grounds, and that the by-law of the company imposing such a fee was *ultra vires* and unauthorized by the defendants' charter or any statute in that behalf; and for an injunction restraining the defendants

from imposing and exacting payment of an entrance fee from the plaintiff and the adult members of his family while he remained the lessee of the premises; and for damages for breach of the covenant for quiet enjoyment contained in the lease.

The action was tried at St. Catharines on June 17th, 1907.

E. E. A. DuVernet, K.C., for the plaintiff.

M. Brennan, for the defendants.

The facts, so far as material, were as follows:—

The defendants, on February 26th, 1875, were incorporated, by letters patent under the "Ontario Joint Stock Companies Letters Patent Act," 1874, 37 Vict. ch. 35, as "The Ontario Methodists Camp Ground Company," the objects declared in the letters patent being for "the purpose of acquiring in the township of Grimsby, in the county of Lincoln, a lot or tract of land, and improving and embellishing the same, and selling or otherwise disposing of the same in lots, plots, or parcels as their by-laws may provide."

It was provided that none but members of the Methodist Church in Canada should be eligible for election as directors of the company; and that the company should not be bound to assent to transfers of stock to any one not a member of the said Methodist Church.

The company thereupon purchased a block of land in the township of Grimsby, of which they had a plan made, subdividing it into lots and plots for park purposes, spaces for auditorium, schools, etc., with streets and avenues giving access to the lots. The plan was filed in the registry office on July 12th, 1875, and was amended in 1880. In 1884, the Act, 47 Vict. ch. 83 (O.), was passed whereby, amongst other powers, power was conferred on the company to increase the capital stock, acquire additional lands, and issue debentures to a limited amount.

Additional lands were then acquired and a new plan made, laying out the said lands into lots or plots, with streets, etc., and amending the former plan. This was also duly filed in the registry office.

Lectures were given in the auditorium, for which expenses were incurred, as also for improvements, keeping up the roads and park grounds.

By sec. 6 of the Act, the company were authorized to "impose upon and collect from any person seeking an entrance into the

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premises occupied by the company, and those claiming under the company, an admission fee, the amount of which shall be fixed by a by-law of the said company; but the payment of such admission fee, or the receipt thereof by the company, shall not be held to prevent the company from excluding or ejecting any person from the said premises for behaving in an unruly or disorderly manner."

On the 27th August, 1885, the company by a lease under the Short Form Act, leased to Margaret Jones, wife of Stephen J. Jones, her executors, administrators and assigns, two lots, namely, "lots Nos. 18 and 19, Victoria Terrace; also a strip of 11 feet deep in rear of said lots, as laid out on a map or plan of the Ontario Methodist Camp Ground, registered in the Registry Office for the county of Lincoln," for the term of 999 years, "subject to the terms, conditions and stipulations" thereafter expressed; and also subject "to the terms and provisions of the letters patent of incorporation of the said lessors, and the by-laws of the said lessors, now existing or hereafter to be duly enacted by them under the authority of said letters patent."

The lease contained a covenant by the lessee, her executors, administrators and assigns, that she "will at all times during the said term, well and truly observe, keep and perform all rules and by-laws heretofore and hereafter to be enacted by said lessors in pursuance of their letters patent of incorporation" and there was a covenant by the lessors for quiet enjoyment.

By a deed of assignment, dated the 29th August, 1897, which was duly registered, the said Margaret Jones assigned the said lease to Adelaide A. Jones; and by deed of assignment, dated 29th August, 1899, the said Adelaide A. Jones assigned to the plaintiff, which was also duly registered.

The whole property of the company was enclosed by a fence, and the only access to the plaintiffs lots was by a road leading from the highway and connecting with the streets or avenues leading to his premises.

The lessee, after the making of the lease to her, entered into the possession of the said lots, erected a summer cottage thereon, which during the summer months had been occupied successively by the lessee and assigns, who have used the said road, streets and avenues and open spaces as laid out on the plans.

In 1902 the company placed a gate at the entrance to the grounds,

and passed a by-law requiring an admission fee or toll to be paid thereat by all persons seeking admission to the grounds, under which they claimed the right to demand payment of such admission fee or toll from the plaintiff and each adult member of his family. By-laws were subsequently passed in 1904, 1906 and 1907, raising the amount of the admission fee or toll.

The name of the company was subsequently changed to the "Grimsby Park Company, Limited."

The plaintiff contested the right of the company to make such charge, and refused to pay the same, and this action was brought to have his rights declared, and for the other relief sought for.

At the close of the case the learned Chief Justice delivered the following judgment:—

MULOCK, C.J.:—The defendants claim the right to exact a toll from the plaintiff for the privilege of obtaining such access to the premises, set forth on a plan filed, as will enable him to reach his own lots, numbers 18 and 19, as shewn on the plan; and they claim the right to impose this toll under the provisions of 47 Vict. ch. 83, sec. 6, of the statutes of Ontario, being an Act to amend the charter of incorporation of the Ontario Methodist Camp Ground Company.

It appears from the plaintiff's evidence that the defendants, in 1875, prepared a plan of their property, which was registered in 1880. They subsequently, in 1884, amended this plan, and registered the amended plan prior to the lease to Mrs. Jones—the lease under which the plaintiff claims. This lease from Mrs. Jones to the plaintiff purports to be for 999 years, and to be with respect to lots 18 and 19 Victoria terrace, and also a strip of land, eleven feet deep, at the rear of the said lots, as laid down on the map or plan of the Ontario Methodist Camp Ground, registered in the registry office for the county of Lincoln.

This lease does not say to which plan it refers; but, in the view that I have, it is immaterial to which plan it has reference.

At the time of that lease there were a number of streets for the convenience of the lots laid out on that plan, and amongst them was a road leading from what had formerly been the private property of this company to the side road. At that time Mrs. Jones, through whom the plaintiff claims title, had the right to

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use that right of way, in my judgment, and sec. 6 of the Act referred to does not, I think, enable these defendants to impose a toll as against the plaintiff, her successor, as owner of the lease of the lands in question.

This section is very awkwardly worded, but I am not able to construe it as justifying the defendants in exacting a fee from any person who is not seeking admission to the premises of the company. I think it is limited to persons seeking to enter the defendants' property, wherever that may be. The latter part of the section seems to make that clear, because it gives the company power to eject from the said premises any one guilty of improper conduct. "The said premises" evidently cannot mean the premises of this plaintiff, but must mean the premises owned by the company. If so, then the section only entitles the company to impose a fee or tax or toll upon persons seeking to obtain admission to the grounds owned by the company.

Mrs. Jones, the lessee, assigned her lease, first of all, to another Jones, and then that second Jones, Adelaide Jones, assigned it to this plaintiff.

The lease contains a covenant on the part of Mrs. Jones that she will at all times during the said term well and truly observe, keep and perform all rules and by-laws heretofore or hereafter to be enacted by the said lessors in pursuance of their said letters of incorporation. Now, in the first place, Mr. Brennan says that they had no power by their letters of incorporation to have erected a toll-gate or to have passed any rules or by-laws to support their contention here. So that, even if the assigns of the lessees were bound under the language of this lease, it is not wide enough to have enabled the defendants to impose a tax under the Act. But, even if it had extended to the Act itself, I am of the opinion that the assignee of Mrs. Jones is not bound. This is only a covenant on her part personally that she will submit to the by-laws. So that the plaintiff is not estopped by any covenant of his predecessor in title.

Then it appears that the defendants, for their own convenience; decided to close up the original right of way, to the use of which the plaintiff was entitled, and to establish another in lieu of it, and for eighteen years this has been the condition of affairs. It is now contended that the plaintiff has, by acquiescence in the

new order of things, lost his right to the old. It seems to me that a fair construction of what has taken place is this: that the plaintiff at one time had a right of way to the side road; the defendants have, in lieu thereof, closed up that right of way, and opened up another by Grand avenue, and that the Grand avenue right of way has now been substituted by common consent for the original right of way out to the side road. So far as the new right of way is concerned, it may, for determining the rights of the parties, be considered as the old right of way. But it has not been shewn that for a sufficient length of time to give these defendants a title they have been obstructing the free passage of this plaintiff through the new right of way. I do not, therefore, find that by prescription or in any other way the defendants have extinguished the plaintiff's right to pass over Grand avenue as freely as he had the right to pass over the right of way from the side road; but his rights have been simply transferred to the new right of way, unimpaired by anything that has occurred.

I, therefore, find that the defendants are not entitled to impose a tax of any kind upon this plaintiff or persons having the right to go to his premises in passing and re-passing over this road; that he and his household, and all persons having the lawful right to visit his premises, have the right of way over this road, free from any burden or tax the defendants may seek to impose, and that the plaintiff is under no obligation to maintain the road or contribute to its maintenance.

Judgment declaring the plaintiff entitled to access to the premises without payment of an entrance fee, this to include all persons lawfully seeking access thereto.

Injunction restraining the defendants from imposing any entrance fee as against any such person. The defendants to pay the plaintiff's costs.

From this judgment the defendants appealed to the Court of Appeal.

On November 22nd, 1907, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

G. F. Shepley, K.C., for the appellants. The company were incorporated in 1875 by letters patent under the then Ontario Joint Stock Companies Letters Patent Act, for the purpose of ac-

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quiring a lot or tract of land and improving same and selling or disposing of it in lots or plots as the by-laws might provide. They then acquired a block of land which they subdivided into lots with park grounds, spaces for an auditorium, schools, etc., and which were subsequently erected. Lectures were delivered and expenses incurred in paying for same and improving the grounds and keeping the same and the roads in order. The company did not sell the lots, but leased them for terms of 999 years, the leases being made subject to the existing by-laws and those to be thereafter passed, and contained a covenant by the lessee on behalf of herself and her assigns to observe and perform such by-laws. Section 6 of the Act, 47 Vict. ch. 83 (O.), conferred the power to impose tolls, and under such power the by-laws from time to time have been passed authorizing the imposition of tolls. The original lessee took her lease on these terms and containing the covenant referred to, and the plaintiff as assignee was bound. The plaintiff knew of the purpose and object of the company and the necessity for charges to pay for the expenses, and in fact acquiesced in the payment of tolls by paying the same up to the year 1906, when he for the first time refused to do so and raises the contention that he is not liable. Section 6 is not limited, as held by the learned Chief Justice, to premises in the actual occupation of the company.

G. H. Kilmer, K.C., for the respondents. The plaintiff is in no way bound to pay tolls. The stipulation and covenant in the lease were merely personal to the lessee, and are not binding on the plaintiff as assignee. The lessee, as appurtenant to her lease, was entitled to a way of access to her property from the highway, and on the plans filed a right of way to the highway was given. The property is all fenced in, and he was entitled to this as a way of necessity. Under the letters patent there is no power to restrict the plaintiff's rights, and under the Act, the company can only pass by-laws not contrary to law and the letters patent. The company cannot delegate from the rights conferred by their lease. The learned Chief Justice properly held that under sec. 6 the right to charge tolls was restricted to the premises actually occupied by the company, such as admission fees to the auditorium, etc. The lessee was assessed and paid the municipal taxes; and the charges paid to the company from time

to time were never paid as tolls, or for the right of access to the premises, but as charges for maintenance.

March 24. GARROW, J.A.:—This was an appeal by the defendants from the judgment of Mulock, C.J., at the trial without a jury, in favour of the plaintiff.

The defendants were on February 26th, 1875, incorporated under the Ontario Joint Stock Companies Act, under the then corporate name of "The Ontario Methodist Camp Ground Company." And the objects of incorporation, as declared in the letters patent, were "for the purpose of acquiring in the township of Grimsby, in the county of Lincoln, a lot or tract of land, and improving and embellishing the same, and selling or otherwise disposing of the same in lots, plots or parcels as their by-laws may provide."

And in the letters patent it is provided that none but members of the Methodist Church in Canada shall be eligible for election as directors, and that the company should not be bound to assent to transfers of stock to anyone not a member of that religious body.

Subsequently, by an Act, 47 Vict. ch. 83 (O.), to amend the charter of incorporation, the defendants were authorized, sec. 6, to "impose upon and collect from any person seeking an entrance into the premises occupied by the company, and those claiming under the company, an admission fee, the amount of which shall be fixed by a by-law of the said company; but the payment of such admission fee, or the receipt thereof by the company, shall not be held to prevent the company from excluding or ejecting any person from the said premises for behaving in an unruly or disorderly manner."

After incorporation, the defendants acquired certain lands in the township of Grimsby, which they caused to be sub-divided and laid out in lots and plots, with certain streets and avenues, as shewn on a plan of sub division duly registered in the proper registry office. And after such registration, namely, on 27th August, 1885, the defendants demised and leased to one Margaret Jones, and her assigns, certain of such parcels, namely, lots numbers 18 and 19 on Victoria terrace, shewn on such plan, and a strip of land, eleven feet deep, in rear of these lots, for a term

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of 999 years, for the expressed consideration of \$165, paid in advance, and one peppercorn to be paid in each year thereafter.

The plaintiff is now, as assignee, the owner of the demised premises, and has been accustomed for a number of years past, with his family, to occupy the house erected thereon as a summer residence.

The lease is upon an ordinary printed form, made under the Act respecting Short Forms of Leases. And the demise is expressed to be made subject to the terms of the letters patent and to the by-laws of the lessors then existing or thereafter to be duly enacted under the authority of the letters patent. The lessee therein covenanted to at all times during the term well and truly observe, keep and perform all rules and by-laws theretofore and thereafter to be enacted by the lessors, in pursuance of their letters patent. And the lessors covenanted in the usual form for quiet enjoyment.

The whole premises, including those of the plaintiff, are enclosed by a fence, and the only entrance is through a gate maintained by the defendants on their own premises, at which the general public is also admitted. The gate admits to the avenues laid out by the defendants, and these lead to and pass the premises of the plaintiff and enable him to reach his house.

Professing to act under the authority conferred by the letters patent as amended, the defendants, after the date of the lease, passed certain by-laws, under which they claim the right to demand and be paid by the plaintiff, and each member of his family, an admission fee in the nature of a toll at this gate; and this alleged right is practically the sole question in dispute.

The subject matter is land, and the question really is one of title, and must, I think, be determined, as any other question of title would be, by an application of the principles which govern in ordinary cases between vendor and purchaser.

There is, to begin with, a good and sufficient demise, accompanied by a covenant for quiet enjoyment on the part of the defendants. At the time of the demise the registered plan shewed certain streets and avenues leading from the public highway to the demised premises, and affording reasonable access thereto. At that time there was no gate and no by-law imposing an entrance fee, so far as appears. These facts alone make for the plaintiff

at least a *primâ facie* case to the reasonable use of such streets and avenues in reaching his premises.

On the argument, counsel for the defendants mainly rested his contention for the right to impose the fee in question upon sec. 6 of the statute amending the charter. But, upon its proper construction, the language of that section, which I have before quoted, does not, in my opinion, help the defendants. Literally, of course, a lessee, who is outside the gate and desires to reach his house, is a person seeking an entrance through the defendants' premises in order to reach his own. But the plain import of the section, taken as a whole, is that the persons who may be made to pay an admission fee are: (1) those who merely seek an entrance to the defendants' premises; and (2) those, having otherwise no right, who seek an entrance through the defendants' premises in order to reach the premises, not of themselves, but of some other person, namely, a person claiming under the defendants, such, for instance, as the plaintiff. And the person so admitted is the same person who may be ejected for disorderly conduct under the latter part of the section—language entirely appropriate to the case of a casual visitor, but wholly inappropriate to a permanent resident, such as the plaintiff.

Upon the question as one simply of contract, apart from the statute, a conclusion entirely satisfactory is not, I think, so easily reached. There is no doubt that it was intended that the lessee, personally, if not his lands, should be subject to some control by means of the by-laws and rules of the defendants. The nature and extent of such control is not, except as bearing on the question of a right to impose an admission fee, now before us. To affect the title it must, I think, clearly fall within the definition of an exception, a reservation or a power, and the language is much too vague and indefinite to express any one of these.

The true solution is, perhaps, to be found in a consideration of the somewhat unusual nature of the whole enterprise as originally projected, which at first was intended apparently to provide what used to be, and, perhaps, still is, well known as a "camp meeting" ground, to be resorted to by those of similar religious views, chiefly for religious exercises, and where the life was to be more or less of a communal nature. And this idea is still apparently maintained, although the originally obscure "camp-meeting" ground

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has since grown into the well-known "Grimsby Park" summer resort, to which thousands of people go annually.

And acting upon and in furtherance of this idea, the directors supply and have throughout supplied various services for the comfort and advantage not only of the defendants, but of the plaintiff and the other cottagers, as they are called, such as water and light supply, garbage removal, police and caretakers' services, the maintenance of streets, etc., to all of which useful and necessary services the cottagers are entitled under rates fixed by by-law, and of which no complaint is now made. And in that class of service the condition in the lease as to by-laws and the lessees' covenant to perform, before referred to, find, I think, a reasonable scope and effect. But the power to regulate such matters would not, I think, carry with it inferentially, for there is nothing expressly upon the subject in the charter, the larger power to impose a toll or admission fee, with the corresponding right to wholly exclude for non-payment, in derogation of the previous demise and in breach of the covenant for quiet enjoyment.

Upon the whole, the appeal, in my opinion, fails, and should be dismissed with costs.

MACLAREN, J.A.:—In my opinion the learned trial Judge erred in treating the relations between the parties in this case as those existing between a lessor and lessee under an ordinary lease for 999 years, and in not sufficiently taking into account the exceptional and communal nature of the undertaking.

This latter clearly appears, to my mind, throughout the record, not only in the name originally adopted for the enterprise, "The Ontario Methodist Camp Ground Company," but in the charter which was obtained in 1875, and in the fact, which appears from the evidence, that an admission fee was charged as far back as 1870, five years before the charter was obtained. It also appears from the statute of 1884, by which the company was "empowered to impose upon and collect from any person seeking an entrance into the premises occupied by the company, and those claiming under the company, an admission fee." The lease to Mrs. Jones of the lots now held by the plaintiff was executed on the 27th of August, 1885, nearly a year and a half after the passing of the

Act of 1884, and was expressly made subject "to the terms and provisions of the letters patent of incorporation of the said lessors, and the by-laws of the said lessors now existing or hereafter to be duly enacted by them under the authority of said letters patent." The lessee further covenanted for her heirs, executors, administrators and assigns to "well and truly observe, keep and perform all rules and by-laws heretofore and hereafter to be enacted by said lessors, in pursuance of their letters patent of incorporation."

The evidence shewed that the grounds in question were surrounded by a high fence on three sides and Lake Ontario on the fourth; that the monies obtained from the sale of lots, admission fees, etc., were devoted to keeping the grounds in order, to the payment of the expenses of concerts, lectures, etc., which were given during the season in a pavilion or auditorium, which was not enclosed, but open at the sides, and which were free to all those on the grounds, the only fee charged being that at the admission gate.

The plaintiff stated in his evidence that he was acquainted with the grounds since 1884, when he occupied a tent, after which he rented cottages until 1899, when he obtained an assignment of the lease to Mrs. Jones. During all these years he paid the admission fee required by the by-laws of the company.

Various other matters were gone into during the trial, but at the close it was agreed on both sides that the whole question to be determined was whether the plaintiff was entitled to an entrance into the grounds without the payment of an admission fee.

In view of the character and nature of the enterprise, as appears from its history and charter, and especially in view of the statute of 1884, which, to my mind, expressly authorized the by-law attacked by the plaintiff, and of the lease which was granted after the passing of the statute, and of which the plaintiff became the assignee, with full knowledge of the history and by-laws of the company, I am of opinion that he fails in his action, and is not entitled to an entrance into the grounds without the payment of the fee exacted by the company, which is not complained of as unreasonable.

From the commencement of the enterprise all those going

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into it entered it with full knowledge that the property was not intended to be dealt with like the ordinary division of land into village or ordinary building lots, but as an enclosed property, where those who obtained admission were to have certain privileges, which were deemed to be desirable and valuable, and for which they were to pay their reasonable proportion under the by-laws and regulations of the company.

I am, consequently, of opinion that the appeal should be allowed, and the action dismissed.

MEREDITH, J.A.:—When the real point in this case is reached, it is a narrow one, covered completely by the enactment in question, which must be given effect to as a public and remedial statute.

The Act empowers the defendants to impose an admission fee upon any person seeking an entrance into the premises occupied by the defendants, and to the premises of those claiming under them, of whom the plaintiff is one; and it is only the amount of the fee which the Act requires to be fixed by by-law; in other words, no fee or toll can be exacted until its amount has been so fixed. I have supplied the words "to the premises of" between the words "and" and the words "those claiming under the company," in the third line of the section in question: sec. 6. That is its plain meaning; in no other way can the words used in it be given any reasonable effect; and it is anything but usual to insert in any writing all the words necessary for its grammatical construction. But if anyone be so unreasonable as to say that those words are not to be "understood," he does not better the plaintiff's position, for the plaintiff is one of "those claiming under the company," and equally liable to the imposition. The concluding words of the section cannot justify a rejection of the words, "and those claiming under the company," and the most obvious, expressed, intention that something more than an entrance to the defendants' premises is included. It would not be such an extraordinary power, to authorise the removal of unruly or disorderly persons from the plaintiff's premises, which are part of a Methodist Church camp ground; and if it were, and some restriction must be applied, the proper restriction would surely be to a removal from the defendants' premises. But, again, if the section related only to the camp

ground proper—the defendants' premises—why would not the section apply to this plaintiff? He seeks entrance to the defendants' premises; he has to in order to reach his own. To say that the lease conveyed the ways through the camp ground to the plaintiff's lots is, of course, unwarranted; the plaintiff would be entitled to a right of way to his lots, the nature of that right depending upon all the circumstances of the case, including of course, the character of grounds and the community occupying them, and so might be subject to restrictions. The ways were part of the defendant's premises, and always so treated, and enclosed within their fences built to exclude entrance, at all points, except at the gates. It may be difficult to see what object there was in enacting the sixth section, in so far as it gives a right to charge a fee, unless to meet such a case as this. What need for legislation as to strangers?

It is, therefore, quite unnecessary to consider any question as to any other right which the defendants claim to have had; nor is it necessary to say more of the lease in question than that it in no sense released or restricted, or provided against the exercise of, the statutory power in question.

The contention made that there cannot have been any intention to allow a lessee to be subjected to a fee, because an unreasonable fee might be imposed, has no sort of weight, for every toll must be a reasonable one, even if fixed in the King's charter granting the toll, and, *a multo fortiori*, when the amount is fixed by those who take it.

"The King cannot grant an unreasonable toll, and it is competent to every subject of the realm, from whom the toll is demanded, to question it being reasonable, even when the exact sum is specified in the charter. This question may always be brought under discussion, in whatever terms the grant may be made." *Corporation of Stamford v. Pawlett* (1830), 1 Cr. & J. 57; affirmed in the Exchequer Chamber, *ib.*, p. 400.

This, of course, does not apply to the case of a toll the amount of which is fixed by Act of Parliament; but does apply with full force to a toll so granted, but in which the amount is not so fixed, and so must be a reasonable toll, to be fixed by the grantee.

No such question is raised in this action; the sole question

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is whether any admission fee can be charged; and nothing prevents it being yet raised.

The plaintiff was within the Act, and liable to the imposition of a fee or toll, and, therefore, this appeal should be allowed and this action dismissed.

Moss, C.J.O., and OSLER, J.A., concurred with Garrow, J.A.

G. F. H.

[IN THE COURT OF APPEAL.]

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TORONTO CREAM AND BUTTER COMPANY, LIMITED, v. THE CROWN
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Banks and Banking—Discount—Assignment of Warehouse Receipts as Security—Present Advance—Bank Act, secs. 86, 90—Firm—Subsequent Incorporation of Company and Assignment of Business to—Evidence of Ownership—Liquidation—Parties—Estoppel.

Before November 28th, 1904, a cream and butter business was being carried on by a married woman under the trading name of the Toronto Cream and Butter Company, her husband being the manager. On that date, with the view of opening an account with the defendants' bank, a letter was written in the trading name stating that a line of credit would be required from \$10,000 to \$12,000 secured by warehouse receipts on butter, and from \$1,000 to \$2,000 on the firm's note, to be otherwise secured. In November, 1904, the account was opened and advances made by the bank, and on October 23rd, 1905, the account was overdrawn to the amount of \$10,158.01, and there was an outstanding note of \$1,700 due in November. On October 23rd the manager discounted a promissory note made under the trading name for \$6,000 at three months, and by the same name assigned to the bank as security therefor warehouse receipts of 401 cases of butter, promising also other warehouse receipts to cover the indebtedness. After placing the \$6,000 to the firm's credit there remained a debit balance of \$4,258.01, which was gradually reduced, and, on December 26th, 1905, when liquidation proceedings were taken, there was outstanding the \$6,000 note, a \$2,000 note discounted on October 27th, 1905, and an open debit balance of \$200. No attempt was ever made to draw out the \$6,000, but the manager of the bank stated that there was no restriction preventing it. The 401 cases had been warehoused on September 21st and 26th, and October 4th, 10th and 20th, while 99 cases had been warehoused on October 20th and 21st, although no warehouse receipts had been obtained therefor, and there was nothing to shew they had ever been assigned to the bank.

The firm had been incorporated as a company by letters patent, dated April 5th, 1905, one of the objects being to acquire the business as a going concern; and by an agreement dated June 1st, 1905, made between the wife and the company, and executed by both parties, all the property, assets and goodwill of the business were sold to and transferred to the company, which agreement was confirmed by a resolution of the shareholders, the husband being appointed manager, and the defendants' bank appointed the company's bank. Notwithstanding the incorporation and sale to the company, the business continued to be carried on as theretofore in the trade name,

no by-laws being passed, and no stock was ever allotted to the vendor of the business, the bank not being aware of the incorporation and sale until some days after the transfer to them of the warehouse receipts:—

Held, that the business was that of the wife and not of the husband, and that there was a valid transfer by her to the company of all the firm's assets and business, so as to vest in them the title to the butter, and though the continuance of the business in the old trade name was objectionable and gave colour to the contention that there was no change in the ownership or control of the business, she was estopped from contesting the company's title thereto.

Held, also, that as to the 401 cases, the transaction was supportable, under sec. 73 of the Bank Act, 53 Vict. ch. 31 (D.), now sec. 86 of the R.S.C. 1906, ch. 29, as on the evidence there was a present advance and not a mere form to cover a past indebtedness; but that the bank had no claim to the 99 cases.

MEREDITH, J.A., dissented on the ground that the note was not "negotiated" within the 90th section of the Bank Act, at the time of the acquisition of the warehouse receipts.

Held, also, OSLER and GARROW, J.J.A., dissenting, that the bank was not entitled to hold the warehouse receipts, under the letter of November 28th, as not constituting an agreement to furnish security for advances thereafter to be made.

Ontario Bank v. O'Reilly (1906), 12 O.L.R. 420, applicable, and *Halsted v. Bank of Hamilton* (1896), 27 O.R. 435 (1897), 24 A.R. 152, 28 S.C.R. 235, distinguished.

Held, also, that the company, and not the liquidator, were the proper parties to the action.

Judgment of TEETZEL, J., at the trial, affirmed.

THIS was an appeal by the plaintiff, the liquidator of the Toronto Cream and Butter Company, which was being wound up under the Dominion Winding-up Act, and a cross-appeal by the defendants, from the judgment of TEETZEL, J., at the trial, without a jury, at Toronto, on April 30th, 1907.

I. F. Hellmuth, K.C., and *J. R. Meredith*, for the plaintiffs.

F. Arnoldi, K.C., for the defendants.

The action was brought by the liquidator of the company, against the bank, to recover the value of 500 boxes of butter, which the plaintiff alleged that the defendants had improperly converted to their own use.

The facts, so far as material, are set out in the judgments.

The learned Judge reserved his decision, and subsequently delivered judgment, dismissing the action as to 401 of the boxes, but allowing the claim as to the remaining 99 boxes.

The judgment of the learned Judge was as follows:—

July 3. TEETZEL, J.:—Action by the liquidator, in the name of the company, which is in liquidation by order dated 26th December, 1905, under the Dominion Winding-up Act, to recover the proceeds of five hundred cases of butter sold by the defendant.

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The defendant claims 401 cases under five warehouse receipts, dated respectively September 21st, 26th, and October 4th, 19th and 20th, 1905, issued by the J. A. McLean Produce Company, Limited, warehouse keepers to the Toronto Cream and Butter Company, and endorsed to the defendant in the name of that company by W. A. Clark, manager, on the 23rd October, 1905.

On the 20th October, 1905, Clark warehoused with the McLean Company forty-five cases, and on October 21st fifty-four cases, which comprise the other ninety-nine cases in question, but no warehouse receipt was ever issued for them.

The Toronto Cream and Butter Company, which I will hereafter refer to as the unlimited company, was a trading name used by Mrs. Annie E. Clark, and the business was managed by her husband, W. A. Clark, under power of attorney.

By Ontario letters patent, dated April 5th, 1905, the plaintiff company was incorporated, one of its objects being "to acquire and assume and continue as a going concern the business hitherto carried on under the firm name of the Toronto Cream and Butter Company." The capital stock was fixed at \$60,000, \$20,000 of which was to be 8 per cent. preference shares.

By agreement, dated 1st June, 1905, between Mrs. Clark, carrying on business under the said trading name, of the first part, and the plaintiff company, of the second part, the former agreed to sell and the latter agreed to purchase all the property, assets, rights, credits and interests of the party of the first part, including all plant, machinery, books, contracts, etc., together with "the goodwill of the said business with the exclusive right to use the name 'Toronto Cream and Butter Company,' as part of the name of the company, and to represent the company as carrying on such business in continuation of the vendor's firm, and in succession thereto, and the right to use any words to indicate that the business was carried on in continuation of or in succession to the said firm," etc.

From this time until the liquidation order, the business was continued in the name of the unlimited company, including all the banking business, and it was not until some days after the warehouse receipts in question had been transferred that the defendant knew that a limited company had been formed; and

I am not able to find that at any time before liquidation the defendant or its manager knew that the business was claimed to be that of the limited company.

It should also be noted that at a meeting of the provisional directors of the plaintiff company, on 25th July, 1905, at which the usual officers were elected, a resolution was adopted that 275 fully paid-up shares of the common stock of the plaintiff company be allotted to Mrs. W. A. Clark for all her right, title and interest in the Toronto Cream and Butter Company, and that the said Toronto Cream and Butter Company, Limited, take over as a going concern all the assets, contracts, real estate and other property and interests of the Toronto Cream and Butter Company, and assume responsibility for all liabilities aforesaid as of June 1st. At the same meeting another resolution was passed that the property occupied by the Toronto Cream and Butter Company, Limited, be purchased from Mr. Harry Webb for \$7,000, to be paid for by an allotment of sixty shares of preferred and ten shares of common stock of plaintiff company, to be delivered to Mr. Webb on execution of all papers necessary to a clear title. At that meeting also the Crown Bank was selected by resolution as the bank through which all the business of the company should be transacted; and the seal was produced and adopted.

A deed of the property was executed by Mr. Webb, dated 1st June, 1905, but neither the stock allotted to him nor that to Mrs. Clark was ever formally issued.

A first meeting of the shareholders of the plaintiff company was held on the 20th day of October, 1905, when a resolution was passed sanctioning and confirming the purchase of the business and assets of the Toronto Cream and Butter Company, as set out in the proposed agreement then read; and further that, upon execution of the agreement by the Toronto Cream and Butter Company, Mrs. Clark directed and authorized the agreement to be executed by the company under its corporate seal, and authorized the directors to allot to Mrs. Clark or her nominee \$27,500 par value of the common stock and to do everything necessary to complete and carry out the transfer according to the agreement, and to take over and assume the business and assets and take possession under said agreement.

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At the meeting of 25th July, W. A. Clark was appointed general manager.

The company never appear to have passed any formal by-laws. The agreement with Mrs. Clark bears the seal of the plaintiff company and the signature of the president and secretary. I presume it was executed after the shareholders' meeting on the 20th October, pursuant to the resolution.

There is no record of any meeting either of the directors or shareholders subsequent to October 20th, and there is no record of any other business of any kind having been done in the corporate name, but everything was carried on in the name of the unlimited company, as before.

The unlimited company had opened an account with the defendant bank in November, 1904, following upon a letter written by the company to the defendant's manager on 28th November, the material parts of which are: "Dear Sir,—Our Mr. Clark called upon you some time ago in reference to opening an account in your bank. We would require a line of from \$10,000 to \$12,000, secured by warehouse receipts upon creamery butter to be stored with the Toronto Cold Storage Company, or Canada Cold Storage Company, Montreal. Also a line of one or two thousand upon our own note, secured by our general account assets as shewn you in our statement. I may say that the latter amount of credit would only be required for a short time during the winter season, when our business is principally local . . ."

From the opening of the account until 23rd October, 1905, the bank had not received any warehouse receipts. On that date the bank account was overdrawn by \$10,258.01, and there was under discount an unsecured note for \$1,700, due November, 1905. When the five warehouse receipts were endorsed to the bank, on 23rd October, 1905, Clark, in the name of the unlimited company and as manager, signed a promissory note for \$6,000 at three months "with interest until paid," which was discounted, and the full \$6,000 placed to the credit of the account. At the same time Clark, in the name of the unlimited company, signed a hypothecation of the warehouse receipts, expressed to be in consideration of the bank having discounted the note of \$6,000, and as security for its payment. The defendant's manager, Mr. Young, says that at that time Clark agreed that he would

bring in further warehouse receipts sufficient to cover the debt; also that the loan would not have been made if security had not been given or promised; but there is no evidence that the ninety-nine cases which had been warehoused on the 20th and 21st October were then or afterwards specifically referred to by Clark.

After placing the \$6,000 to the credit of the account, there remained a debit balance of \$4,258.01, in addition to the current \$1,700 note. This balance was thereafter gradually reduced, and at the time of the liquidation there was only outstanding the \$6,000 note, a \$2,000 note discounted on 27th October, and an open debit balance of less than \$200. No attempt was made to draw out the \$6,000, and the evidence leaves it uncertain whether the company would have been allowed to do so. The most I can say is that there was no express prohibition against doing so, nor was any attempt made to do so.

After the liquidation the defendant realized on the whole 500 cases, having given an indemnity to the warehouse company in respect to the ninety-nine cases. The following general questions arise for determination: (1) Had the plaintiff company any title in the 500 cases when warehoused? If the answer to this is "no," of course the action fails. (2) Assuming they were the property of the plaintiff company, who is entitled to the proceeds of the 401 cases covered by the warehouse receipts? and (3) who is entitled to the proceeds of the ninety-nine cases?

As to the first question, I think the effect of the agreement between Mrs. Clark and the plaintiff company was, as against her, when it was adopted by the shareholders on the 20th October, to vest in the company all her business assets, and the right to continue the business in her trade name. While the method adopted of continuing all the business in the name of the old company for the benefit of the new was objectionable in many respects and gives color to the argument that there never was in fact any change of ownership or control, I think Mrs. Clark would be estopped from claiming any interest in the property then or subsequently acquired by the company, except in her capacity as stockholder, and that therefore the butter in question was the property of the plaintiffs when it was warehoused.

As to the four hundred and one cases, I think the defendant is entitled to hold the proceeds thereof by virtue of sec. 73 of the

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Bank Act, 53 Vict. ch. 31 (O), now sec. 86, R.S.C. 1906, ch. 29. Counsel for the plaintiff submitted that the evidence brought the transaction within the prohibitive provisions of sec. 75 of the Bank Act, now sec. 90 R.S.C. 1906, ch. 29, which provides that "the bank shall not acquire or hold any warehouse receipt or bill of lading or any such security as aforesaid to secure the payment of any bill, note, debt or liability unless such bill, note or liability is negotiated or contracted (a) at the time of the acquisition thereof by the bank, or (b) upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank."

And it was argued that the case was governed by *Halsted v. Bank of Hamilton* (1896), 27 O.R. 435, (1897), 24 A.R. 152, and (1897), 28 S.C.R. 235, which decided that a bill or note taken by a banker is not "negotiated" within the meaning of this section at the time of the acquisition of the security when the person giving the security and to whose account the proceeds of the bill or note are credited is not at liberty to draw against them except on fulfilling certain other conditions.

At p. 439, Meredith, C.J., in giving judgment, says: "It is, I think, impossible to treat any of the notes which the assignments purported to secure as having been 'negotiated' in the sense in which that term is used in section 75, at the time the assignments were made: it is true that the form was gone through of taking the notes and passing the amount of them to the credit of one of the accounts, but contemporaneously with this an equal amount was placed to the debit of another of the accounts, and not a farthing of the amounts which the notes represented could be touched by Zoellner or made available by him for any purpose unless he should bring to the defendants and leave for collection or discount customers' paper, which would entitle him to credit in account No. 2 for an amount equal to that which he proposed to withdraw."

I am unable to find in this case that the transaction of discounting the \$6,000 note and placing the proceeds to the credit of the overdrawn account was a mere form intended only to reduce the overdraft, or that there was any restriction against the customer drawing the same out in the ordinary course of business, and therefore *Halsted v. Bank of Hamilton* would not apply.

This case is more like *Ontario Bank v. O'Reilly* (1906), 12 O.L.R. 420. In that case there was negotiation of a note and an actual advance at the time of acquisition of each warehouse receipt, although on most occasions when the discount was effected the account was overdrawn, that was in the ordinary course of dealing, and the circumstance did not deprive the transaction of its character of a negotiation of the note, for the proceeds were placed freely at the disposal of the customers and the drawings on the account continued as before, and it was held, distinguishing *Halsted v. Bank of Hamilton*, that the warehouse receipts were valid securities.

But whatever may be the legal effect of the transaction upon the evidence of what was done when the warehouse receipts were assigned, in the light of the two cases referred to, I think the letter of November 28th, 1904, would entitle the bank to hold the warehouse receipts as security for the advances which constituted the large overdraft referred to. That letter was, in my opinion, "a written promise or agreement that such warehouse receipts would be given to the bank" within the meaning of the Bank Act, and while the warehouse receipts are not identified in it, and a different warehouse is named, I think when the customer assigned the warehouse receipts it was the intention of both parties to appropriate them to the "written promise" made when the account was opened. While the promise may not have been sufficient to entitle the bank to an equitable claim in the nature of specific performance or otherwise, upon the goods warehoused with the McLean Company, the plaintiff cannot now, after execution of the transaction, be permitted to repudiate it.

As to the ninety-nine cases, I am of the opinion that no warehouse receipt ever having been given or assigned in respect to them, the bank is not entitled to hold the proceeds. There was no written promise or agreement to furnish any specific warehouse receipt, no agreement to warehouse goods with the McLean Company, and no executed appropriation of the ninety-nine cases to a written promise. At most there was a verbal agreement when the receipts for the four hundred and one cases were assigned, with reference to further warehouse receipts, which verbal agreement, being unexecuted and in violation of the Bank Act, and being beyond the power of the bank to enter into, gives no

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equity to the bank in reference to the goods in question: *Bank of Toronto v. Perkins* (1882), 8 S.C.R. 603; Fry on Specific Performance, 4th ed., p. 217, and cases there cited.

The defendant's counsel objected that the liquidator and not the company should be plaintiff, and cited *Kent v. La Communauté des Sœurs de Charité*, [1903] A.C. 220.

This being an action to recover the company's property, it seems to me it is properly constituted within the authority of that case. Upon the objection being raised, the plaintiff applied for leave to add or substitute the liquidator as plaintiff, but it does not seem to me that any amendment is necessary.

The judgment should therefore be in favour of the plaintiff for the net proceeds of the ninety-nine cases received by the defendant, amounting to \$1,198.89, with interest at 5 per cent. from January 27th, 1906.

As the plaintiff has failed in the more substantial part of its claim, the judgment will be without costs. The defendant has also failed in a material part of its claim, and should not be allowed costs: see *Suter v. Merchants Bank* (1876), 24 Gr. 365, where under similar circumstances the costs were disposed of in this way.

On November 18th, 1907, the appeal was heard before Moss, C.J.O., OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

I. F. Hellmuth, K.C., and *J. R. Meredith*, for the appellants. The judgment of the learned trial Judge holding that the defendants were entitled to the 401 cases of butter should not be supported. By the letters patent incorporating the plaintiffs express provision is made for the plaintiffs taking over the business, which had been carried on under the name of the Toronto Cream and Butter Company, and under the agreement made by Annie M. Clark with the plaintiffs, the good-will, property and assets were duly transferred to the plaintiffs. The plaintiffs, therefore, were the only persons who could deal with the property, and W. A. Clark had no authority to do so. There was never any valid transfer of the warehouse receipts to the defendants. They did not pass under section 73 of the Bank Act 53 Vict. ch. 31 (D.) now section 86, R.S.C. 1906, ch. 29. They were not given to secure a present advance; but in reality to cover a past in-

debtedness. The alleged discount of the \$6,000 note was a mere pretence. The bank took good care to keep control of the proceeds. It is hardly conceivable that Clark would have allowed the amount to remain in the bank, had he the right to withdraw it. The letter of November 28, 1904, did not constitute a binding agreement to give security. This case comes within *Halsted v. Bank of Hamilton*, 27 O.R. 435, 24 A.R. 152 and 28 S.C.R. 235, in which it was held under circumstances similar to those here that nothing passed under the warehouse receipts.

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F. Arnoldi, K.C., and *D. D. Grierson*, for the respondents. The business was really that of W. A. Clark and not of his wife Annie M. Clark. At all events Clark acted under a power of attorney from her to transact all the business and the business was transacted by him. There never was any valid transfer of the property and assets of the incorporated company to the plaintiffs. Annie M. Clark had no power to transfer it and the transaction was never really completed, and notwithstanding the incorporation of the company the business continued to be carried on just as before in the name of the unincorporated company. The defendants never heard of the incorporation, and dealt with W. A. Clark just as they had done from the commencement. To allow the plaintiffs' contention to prevail would be to permit a fraud to be practiced on the defendants. The letter of November 28th, 1904, constituted a valid agreement to give security, and the account with the defendants was opened up on the faith of such agreement. The discount of the \$6,000 note was for a then present advance, and was a valid transaction. This clearly appears from the Manager's evidence, which was uncontradicted. The defendants were therefore entitled to take the warehouse receipts as security and acquired the property therein. In any event the warehouse receipts could properly be assigned to the bank to cover the original indebtedness. Under the statute the transfer is valid, when it is made under an agreement to subsequently furnish security, and so in giving the warehouse receipts W. A. Clark was merely carrying out the terms of the agreement contained in his letter. The case is therefore quite distinguishable from *Halsted v. Bank of Hamilton*, and is governed by the case of *Ontario Bank v. O'Reilly*, 12 O.L.R. 420.

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As to the cross-appeal the learned Judge should have given judgments for the defendants as to the 99 cases of butter, as these also validly passed to the defendants.

I. F. Hellmuth, K.C. As to the cross-appeal. There never were any warehouse receipts given for the 99 cases, and nothing on which the defendants can maintain a lien on them, and the Judge very properly found in the plaintiffs' favour as to them, and his judgment as to them should not be disturbed.

March 24. Moss, C.J.O.:—I am of opinion that both appeals should be dismissed for the reasons assigned by my brother Maclaren.

OSLER, J.A.:—I think the appeal should be dismissed. I agree with the findings of Teetzel, J., upon the evidence. These bring the case quite within the principle of the decision of this Court in *The Ontario Bank v. O'Reilly*, 12 O.L.R. 420, referred to and followed by the learned Judge.

As to the defendants' cross-appeal in respect of the ninety-nine cases of butter, I think that the learned Judge was also right for the reasons given by him. The cross-appeal should therefore also be dismissed.

GARROW, J.A., concurred with Osler, J.A.

MACLAREN, J.A.:—Before the incorporation of the plaintiff company the business in question had been carried on, under the name of the Toronto Cream and Butter Company, by Mrs. Annie E. Clark, her husband, W. A. Clark, acting for her under a power of attorney.

The company was incorporated by Ontario letters patent on April 9th, 1905, one of its objects being declared to be "to acquire and assume and continue as a going concern the business hitherto carried on under the firm name of the Toronto Cream and Butter Company."

The statement of defence set out that the business never really belonged to Mrs. Clark, but to her husband, since deceased, and that it was never really made over to the incorporated company; and the evidence was largely directed to these points. It was

also objected that the action should have been brought in the name of the liquidator and not of the company.

The trial Judge declined to give effect to these objections; and held that the business had belonged to Mrs. Clark, and while there were irregularities in the steps taken to transfer it to the incorporated company, yet Mrs. Clark would be estopped from claiming any interest in the butter in question, and that it was really the property of the plaintiff company when it was warehoused.

These objections are renewed in the reasons against the appeal, and in the counterclaim, and were very strenuously pressed upon us in the argument of counsel for the bank.

I am of opinion, however, that the trial Judge was clearly right in overruling them, and that his judgment in this respect should be affirmed. Mrs. Clark, by her husband as her attorney, purported to transfer the business and assets to the incorporated company, and the real question to be decided is, whether the bank acquired a good title to the warehoused butter, and no useful purpose would be served by adding parties, or having the matter tried over again with new plaintiffs, even if the objections had been more serious than I consider them to be. It is not disputed that if the bank acquired a good title from Mr. or Mrs. Clark it should succeed.

The bank claims, first, that it acquired the warehouse receipts for the four hundred and one boxes as collateral security for the payment of a debt incurred in its favour by the Toronto Cream and Butter Company, in the course of its banking business, in accordance with sec. 73 of the Bank Act of 1890, which was in force when the transaction in question took place; and that it acquired them under a written promise, which was a sufficient compliance with sec. 75 of the Act, which provides that "the bank shall not acquire or hold any warehouse receipt or bill of lading or security under the next preceding section to secure the payment of any bill, note, or debt or liability unless such bill, note or debt or liability is negotiated or contracted at the time of the acquisition thereof by the bank, or upon the written promise or agreement that such warehouse receipt or bill of lading or security would be given to the bank."

The evidence shews that on the 23rd of October, 1905, the

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account of the Toronto Cream and Butter Company at the bank was overdrawn to the extent of \$10,258; that W. A. Clark brought a note of the unincorporated company for \$6,000 and interest, signed by him as manager, to be discounted; that the proceeds were placed to the credit of the company, reducing the overdraft by \$6,000; and that at the same time he deposited with the bank the warehouse receipts of the McLean Produce Company for four hundred and one boxes as collateral security for the payment of the note.

The bank claimed, first, that it was entitled to hold the warehouse receipts under a letter of November 28th, 1904, from the company, by Clark as manager, addressed to the bank, as a sufficient written promise under sec. 75 of the Bank Act above quoted. The letter reads as follows: "Our Mr. Clark called upon you some time ago in reference to opening an account in your bank. We would require a line of from ten to twelve thousand dollars, secured by warehouse receipts upon creamery butter, to be stored with Toronto Cold Storage Company or Canada Cold Storage Company, Montreal." The remainder of the letter is not material to the present issue.

The trial Judge was of opinion that this letter was a sufficient "promise or agreement that such warehouse receipts would be given to the bank" to comply with sec. 75 of the Bank Act.

With this conclusion I am, with great respect, unable to agree. There is certainly no evidence of an "agreement," and I do not think that it is such a "promise" as the Act contemplates. If, when the loans which go to make up the overdraft were made, there had been a written promise to furnish specific warehouse receipts, and the loans were made on the strength of such promise, then the case would have been entirely different. I think the fair inference from the letter rather is that the company would furnish warehouse receipts to the bank at the time they were contracting the loans or negotiating the notes, as is done in the ordinary course of business. Besides, the warehouse receipts mentioned in the letter are those of the Toronto Cold Storage Company and the Canada Cold Storage Company; the one now in question is given by the McLean Produce Company.

For the ninety-nine boxes the bank has no claim except the alleged promise contained in the letter and a verbal promise given

by Clark the last time he was at the bank, so that its cross-appeal with respect to these must be dismissed.

As to the four hundred and one boxes, the bank claims the right to hold them on another ground, namely, that it acquired the warehouse receipts covering these on the 23rd of October, 1905, as collateral to secure the payment of the \$6,000 note of the company discounted and negotiated on that day.

This brings up directly the question, was the transaction of that day a *bonâ fide* discount and negotiation of the \$6,000 note, or was it a mere colourable transaction to substitute the current paper for so much of the overdraft, and furnish a pretext for the taking of the warehouse receipts?

There can be no doubt that the form in which it was put through in the books of the bank was that, when the \$6,000 were put to the credit of the company, the effect was simply to reduce the overdraft by so much. But we should look at the substance of the transaction rather than at the form. If the proceeds of the note were not placed under the control of the company, then I do not think it could be said that there was a "negotiation" of the note within the meaning of sec. 75. The case would then fall within the rule laid down in *Halsted v. Bank of Hamilton*, 27 O.R., at p. 439, which was affirmed by this Court, 24 A.R. 152, and by the Supreme Court, 28 S.C.R. 235.

It therefore comes to be a question of fact as to what was the real nature of the transaction of the 23rd of October. When asked to give the history of the transaction, Mr. Young, the bank manager, says: "Mr. Clark came to the bank with some warehouse receipts, and said the butter was going to remain for some time, and wanted to get a loan on the butter for three months, and got the loan."

He says, further, that the bank was not pressing for the payment of the overdraft, and that the taking of the note and the warehouse receipts had no reference to the overdrawn account; but was for a loan on the butter to provide funds for the continuing of the account in the ordinary way. He also says, in answer to his Lordship, that there was no condition imposed upon Clark at the time the loan was made which would prevent his drawing it out, and that if he had given a cheque immediately for the whole \$6,000, the bank would have honoured it.

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This evidence, if accepted, at once distinguishes this case from *Halsted v. Bank of Hamilton*, and puts it in the same class as *Ontario Bank v. O'Reilly*, 12 O.L.R. 420, where this Court upheld transactions where warehouse receipts were received by the bank when the account of the customer was overdrawn, on the ground that the proceeds were placed freely at the disposal of the customer, and the drawings on the account continued as before.

Inasmuch as the trial Judge considered that the letter of November 28th, 1904, would entitle the bank to hold the warehouse receipts as security, he has not made such express findings upon the evidence as he probably would otherwise have done. However, he says: "I am unable to find in this case that the transaction of discounting the \$6,000 note and placing the proceeds to the credit of the overdrawn account was a mere form intended only to reduce the overdraft, or that there was any restriction against the customer drawing the same out in the ordinary course of business."

The fact that the money was not actually drawn out would, no doubt, be a circumstance that might point to an opposite conclusion if not explained or accounted for.

I think the explanation given by Mr. Young is a reasonable one. The fact that Mr. Clark left for Muskoka almost immediately, where he met his death a few days later, appears to account for it. The business was an active and apparently a prosperous one; but it is evident that all parties relied upon Mr. Clark. His death completely changed the position of matters. But the transaction is to be judged by what took place on the 23rd of October. It was either good or bad on that day, and subsequent events can only be looked at in so far as they may enable us the better to understand the real nature of the transaction of that day. Mr. Clark is not here to give any different aspect to the transaction from that given by Mr. Young. His evidence is positive and uncontradicted, and is not discredited by the trial Judge.

On these grounds I am of opinion that the judgment appealed from as to the four hundred and one boxes can be upheld, and that the main appeal should, consequently, be dismissed with costs.

MEREDITH, J.A.:—There is really but one substantial question in contest between the parties to this appeal, and that question is, whether the defendants alone are entitled to the proceeds of the sale of the goods in question, or whether entitled only to share rateably with other creditors in them. A great deal of time and many words have been expended in skirmishing over other grounds; but they are, so far as the parties' substantial interests are concerned, unimportant; for what sort of difference can it make to them whether the common debtors be called the Toronto Cream and Butter Company, Limited, or the Toronto Cream and Butter Company without the additional word, or by any other name. And all persons substantially interested—that is, the creditors—are now substantially before the Court, in the persons of the defendants and the official receiver of the plaintiffs, who is prosecuting this action. The case is, therefore, essentially one in which all necessary amendments, if any be necessary, should be made, so that the action may be so constituted, and the case so stated, that that one substantial question may be considered, and that the parties may be saved from the infliction of unnecessary costs, and unnecessary delay; for what fair and honest profit can it be to anyone that an action should be dismissed to-day, without considering the one substantial thing in controversy, to be followed to-morrow by a like action, so that, and in which, that one thing may be determined? But I agree with the trial Judge in his opinion that the action as constituted is sufficient to call for a determination of the real question, and that there is no reason why the substantial interests of the parties may not be fully served in it, nor any excuse for further delay or additional cost.

Throughout the transactions involved in, or in any way connected with, this case, there has been but one and the same business, by whatsoever name or names it may be, or may have been, called. That business was originally carried on as that of Mrs. Clark, by her husband as manager of it for her; and it had been always carried on in the name of the Toronto Cream and Butter Company until the spring of the year 1905, when a joint stock company was incorporated for the very purpose of taking it over and carrying it on—to use the words of the letters patent, “To acquire and assume and continue as a going concern the busi-

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ness hitherto carried on under the firm name of the Toronto Cream and Butter Company." To carry into effect that purpose, in a legal and formal manner, a deed was made, bearing date the 5th day of June, 1905, between Mrs. Clark and the newly incorporated company, which was executed by all parties, her husband signing as attorney for the company, by which she transferred to them, in very comprehensive words, the business, its goodwill, and all its property. The husband was duly appointed general manager and secretary-treasurer of the company, and other appointments were made, and lands were purchased by and conveyed to them, and the purpose of the incorporation effected, but carelessly, though not extraordinarily under all the circumstances, a good many of the usual formalities were omitted. But it is to be borne in mind that the defendants have no right to concern themselves with any question of the regularity or irregularity of the internal management of the concern, nor with any question except such as affects the title to the goods in question.

The extraordinary contentions of the defendants now made, in this respect, are, in the first place, that, though the whole of the business with them was transacted as the business of Mrs. Clark, as registered owner, carrying on business in the name of the Toronto Cream and Butter Company, through her attorney, her husband, acting under a power of attorney made by her expressly authorizing that very business, it was really not hers, but was his, ignoring not only all these circumstances but also the facts that it was quite within the lawful power of the wife and husband to make the business really that of either of them, and that there is no evidence that it was not really hers, as well as the fact that, if the contention were sustainable, it would not evade the substantial matter in controversy, but merely necessitate the adding of parties. And, in the second place, that the incorporation of the plaintiff should be treated as a dead letter entirely, its meetings and appointments of officers and other acts mere wasted energy, having no sort of effect, its letters patent but waste paper, and the deed of the business, its goodwill and property, though signed and sealed by all parties and in the possession of the plaintiffs, a thing of naught; the winding-up order a farce, and the proofs of claims of creditors, settlement of lists of contributories, and other proceedings in the office of the Master-in-Ordinary a bur-

lesque, and all at the instance of those who make no pretence of being shareholders, or having any sort of interest in the company, and regardless again of the fact that, if the contention should prevail, the substantial question would still face the defendants, and must, sooner or later, be determined between them and the proper parties. The defendants' attempt to hark back to the business as originally carried on, and to contend that it was really the husband's and not the wife's, seems to me to be a pure waste of time, for if husband and wife chose to make it the wife's, what possible right could the defendants have to prevent them? There are no creditors of the husband endeavouring to set aside the transaction, if there were one, as a fraud upon them. The defendants' debt was originally contracted with the wife, through the husband acting, as I have said, as her agent under a power of attorney from her authorizing the transaction of that very business with them for her known as and trading under the name of the Toronto Cream and Butter Company. Nor, to repeat, can I understand by what right the defendants can make a deep scrutiny into the regularity of the internal affairs of the incorporated company, or what difference it can make to them whether the stock was or was not duly allotted.

It is to be remembered, also, that the *jus tertii* cannot in such a case be set up against one in possession, and I have no doubt that the plaintiffs were in possession of the goods in question if the defendants' warehouse receipts are invalid. But, again repeating, all these things are quite unsubstantial, for, if effect had to be given to any of them, all necessary amendments ought to be made, so that the real question may be, in one action, finally determined. There is, of course, no reason why the defendants may not, if they chose, take the ground that Mrs. Clark is liable to them, on the ground that she always held herself out to them as the contracting party, and that they had no notice or knowledge of the transfer of the business to the incorporated company; but if they take that position in this action they lose all right to the goods in question, if they were in truth the property of the company.

Coming back then to the single substantial matter in controversy, it depends upon the one question whether the defendants acquired the title to the goods in question under the transfer of the warehouse receipts to them—whether it was within

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their power to take them. But that that question covers the whole ground, and much more, another question might arise, namely, whether the transfer of the warehouse receipts could be avoided as an unjust preference to favored creditors. Though that question is, for that reason, immaterial, it, and the cases decided upon it, may throw light on the real question in issue, which, put in its narrowest and most direct form, is: was it competent, or was it *ultra vires*, of the defendants to take the transfer of the receipts in question as they did? Their power in that respect is prescribed in the Bank Act, which prohibited them taking such receipts to secure payment of the note in question, unless (1) the note was negotiated at the time the receipts were acquired, or (2) upon a written promise or agreement that such receipts would be given to them. The purposes of the prohibition are, doubtless, the protection of other creditors and the prevention of fraud and perjury, and so the enactments respecting fraudulent conveyances and unjust preferences, and also respecting chattel mortgages, and all such enactments as the Statute of Frauds, are, to some extent, *in pari materiâ*. The circumstances which the Bank Act make necessary to empower a bank to take such security are very like those involved in an inquiry whether or not an unjust preference has been given; but, under the Bank Act, the intention to prefer is not an ingredient; being carried away with the idea that a *mala fide* is necessary is apt to lead to error; the validity or invalidity of the transaction depends solely upon the fact of contemporaneous negotiation or liability or of valid antecedent "promise or agreement." Was there any such promise or agreement? It seems to me very obvious that there not only was not, but there was in law no promise or agreement at all. It can hardly be reasonably contended that a statement made by a proposed customer that he will give security for such money as may be lent to him is a promise or agreement in any legal sense. There was nothing in any way binding upon either party in the letter of the 28th day of November, 1904. The borrower was not bound to borrow, nor the lender to lend; nor was the one, in any sense, precluded from borrowing, nor the other from lending, without security. It was entirely *nudum pactum*, if it could be looked upon as a promise at all. The defendants did lend all that was

lent without getting and without asking for any security. They did not choose to avail themselves of the proposition contained in the letter. Afterwards they had no sort of legal right to demand security for the loan which had been made, and, obviously, must have failed if they had sought to enforce any such demand in the courts. But, more than that, the enactment, in very plain words requires that *such note or liability* shall be negotiated or contracted upon the written promise or agreement that *such warehouse receipt* shall be given. The promise must be in regard to the very transaction; and it need hardly be said that there was not such a promise or agreement to give the receipts in question as security for the note in question. The extravagant counterclaim of the defendants, for specific performance of the letter of the 28th day of November, 1904, tends to accentuate its shortcomings. It would be extraordinary if, in the face of the purposes of the legislature expressed in such enactments as the Chattel Mortgages Act, a bank might, by such a writing as that in question, obtain a secret "blanket" mortgage valid against other creditors as well as against the maker of it. I would have thought it very obvious that what was contemplated by Parliament, and what is provided for by the words of the enactment under discussion, was and is : promise made at the time when the loan is made to give certain security for it at some future time. That such promise is to be tantamount to the actual giving of the security upon the well-known equitable principle of everyday application in cases of alleged unjust preferences of creditors.

The principle, and the cases in which it has been applied, are very familiar, as are the facts that such a defence is looked upon with suspicion, and required to be clearly proved generally, and that the onus of proof of the fact of the agreement, as well as of good faith in the taking of it, is upon him who sets it up: *Ex p. Kilner, Re Barker* (1879), 13 Ch.D. 245.

But, even assuming the writing to have been a valid enforceable document, for two plain reasons it fails to support the defendants' claim: (1) It does not provide for the securing of past due debts; it refers to loans to the extent of \$10,000 to \$12,000 "secured by warehouse receipts"—that is to say, the proposition was that if the bank would accept the applicant as a customer

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“with a line of credit,” he would give security; not a promise of security after the loan—for that would not be security at all—but would give security for the loans as they were obtained, as the defendants, at all events, knew the Bank Act required. The defendants chose to lend the money without exacting, or even asking for, the proposed security, as they, of course, had a perfect right to do; and could not afterwards enforce the giving of it, or, rather, of subsequent security instead of the security proposed. Then (2) the security was to be by way of warehouse receipts of other and entirely different companies for butter stored with them, in no sense identical with those in question. How, then, can it be said that the plaintiffs are bound to give those in question; how can the Courts make, as well as enforce, a different contract between them? It seems to me, for these several reasons, quite futile to endeavour to adduce any title to the goods in question under the defendants’ power to take warehouse receipts by virtue of an antecedent promise or agreement, and so their defence, as well as their counterclaim, based upon this ground, fails.

This brings me to the one substantial question, as it seems to me, in this appeal, namely, whether the note in question was negotiated at the time of the acquisition of the warehouse receipts. Having regard to the purposes of the 90th section of the Bank Act, as well as to its very words, negotiation must mean the whole contract, the giving of the consideration as well as the incurring of the liability and the transfer of the receipts; they must be contemporaneous acts; a pre-existing debt cannot support the transaction. Some of the very words of the enactment which shew this are those providing that the “liability” must be “contracted at the time of the acquisition by the bank of such warehouse receipts.” So, also, the provision as to a previous agreement in writing to give such warehouse receipts. This is common ground; and the only question argued or arguable upon this branch of the case was and is whether, when the note was given and the security taken, there was in truth an advance or loan of the amount of it. The uncontrovertible facts, and, indeed, the admitted facts, make it appear very plain to me that there was no sort of such loan or advance, or any sort of consideration for the note, unless it was part of the pre-existing advances or loans, made without obtaining or asking for any sort of security for any of

them. "Not one farthing" of the amount of the note was ever received, directly or indirectly, by the makers of the note or by anyone representing or for them or their creditors, nor ever can be so received; so far as they and the defendants were and are concerned, the whole transaction, in a money sense, amounted and amounts to nothing but crediting the makers with the amount of the note—on the one side of the accounts between them, and debiting it on the other side. In addition to that, the defendants obtained such additional evidence of the plaintiffs' indebtedness to them as the note afforded, and also the ineffectual transfer of the warehouse receipts, and that was and is the whole sum and substance of the transaction.

The discussion as to what was the intention of the parties, or, rather, the intention of the defendants in taking the note, seems to me to be, in the circumstances of this case, quite immaterial; the question must be, what was done, not what was intended; but if intention were material, I would have no hesitation in finding that the one intention was to secure part of the pre-existing debt—a part about equal in amount to the value of the goods which constituted the security—such being about \$6,000; and that it was never intended that the plaintiff should receive and take away the proceeds of the note, or, more correctly speaking, the amount of it, or any part of it, nor would they ever have been permitted to do so. Concerns such as that in question, depending upon moneylenders entirely for the means of carrying on their businesses, do not borrow \$6,000 merely to let it lie, without interest and without profit of any kind, in the lender's hands; they do not go through the idle form of giving a note for \$6,000 merely to have it credited and debited in the lender's books. The transaction is explicable only as intended to give the defendants security for part of the pre-existing debt. I very much prefer evidence of the character of the proof of the pudding—the things which were actually done—and evidence such as the surrounding circumstances and the probabilities of the case afford, to the naturally biased, and certainly in some respects equivocal, testimony of the assistant manager of the defendants upon this question, if it had to be determined. If such transactions could and should be supported upon parol evidence as to intentions, a large inroad would be made upon the

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purpose of Parliament to prevent frauds and perjuries; it would open a wide door to them; and it is very difficult to convict of false swearing as to mere intentions. I, of course, have no reference to this case, in these observations, but of the subject generally.

Each of the two cases, which were referred to at the trial as well as in this court, was decided upon its facts, and therefore, to that extent, is not a binding authority in this or in any other court; but, so far as either enunciates or discloses any principle applicable to transactions such as that in question, it is distinctly against the defendants. In the *O'Reilly* case, as I understand it, it was found as a fact that the giving of the notes, the payment of the considerations for them, and the giving of the securities, were all in substance and in truth contemporaneous, just as much as if the consideration had been handed over in money at the time, and the makers had chosen to deposit it and drawn upon it in the ordinary course of their business. The facts of that case are very obviously different from those of this case. In this case there is nothing whatever to warrant any such conclusion; there was no sort of receipt of the consideration, no sort of actual loan of the money, nor was even a farthing of it appropriated to the plaintiffs' use or received by them, nor, indeed, were they in any manner benefited by it; it was for all substantial purposes, so far as any benefit went to them, just as if the transaction had not taken place. In regard to the other case—*Halsted's*—in all essential circumstances it seems to me to have been quite the same as this case, and, indeed, the same in all its circumstances, material or not. The language of the judgment of the court of first instance, approved of and adopted by the Supreme Court of Canada, is singularly applicable to this case; much of it might be incorporated here word for word, to the very much better elucidation of my views than anything I have said; but I forbear, as the report of it, in its entirety, is readily accessible to all concerned in this case. It was urged that that case was different from this because there the debtor could not have drawn one farthing of the loans without the consent of the bank. As I have before intimated, that is not the essential question; the essential question is, did the debtor, in substance and in fact, receive the consideration at the time? And in this view of the enactment I am, I think, entirely in accord with the

views expressed in that judgment. But, in substance and in fact, the debtors were in this case, quite as much as in that, wholly unable to draw, or obtain by any legal means, one farthing of the amount of the note in question without the consent of the defendants. In what possible manner could they? Even if it had been more than the intention, if it had been the expressed agreement that they should be paid the money, it was entirely within the power of the defendants to withhold it and appropriate it towards the payment of the much larger overdue indebtedness of the plaintiffs to them; to set it off *pro tanto* against such larger indebtedness. If *Halsted's* case were well decided, how can the defendants succeed on this branch of the case? Indeed, this is a stronger case against them, for in that case it appears that, after the making of the notes and giving of the securities and carrying the amounts of the notes to the debtors' credit in the books of the bank, he drew from that account amounts equal to the amounts of the notes; in this case there were no such receipts by the plaintiffs, but they gradually reduced the amount of their indebtedness to the defendants until their failure.

I would allow the appeal, and direct that judgment be entered for the plaintiffs, and damages in the amount of the proceeds of the sale of the goods in question, leaving the judgment dismissing the counterclaim to stand. The defendants should pay the costs of the action and of the appeal. But, if the plaintiffs desire to do so, I would give them leave to amend as far as may be necessary for the adding, in the usual manner, as plaintiffs, the official receiver of the plaintiffs, the legal representative of Clark, and a creditor suing in behalf of himself and other the creditors of Clark, and also Mrs. Clark, and a creditor so suing as to her, or any one or more of them; but if any such amendment be made, then I would make no order as to costs of the action or appeal, but would leave the parties to pay their own costs respectively. All parties substantially interested in the one substantial matter in question are now substantially before the Court—the defendants on the one side and all the other creditors represented by the official receiver, who is carrying on this action, on the other side; so that it seems to me inexcusable to permit another action to be brought, and to proceed, at great cost, over precisely the same grounds.

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BOYLE ET AL. V. ROTHSCHILD ET AL.

March 19.

Costs—Taxation—Witness Fees—Foreign Witness—Employee of Party to Action—Party as Witness.

\$1,000, with \$510 for expenses, allowed as witness fees for a Dominion land surveyor, a necessary foreign witness, who came from the Yukon to give evidence at the trial of this action at Sandwich, involving absence from home for 51 days.

The Court refused to allow a similar sum to another witness from the Yukon who was in the employ of the party litigant calling him: only \$630, inclusive of expenses, being allowed in his case.

When a party to an action is a necessary and material witness on his own behalf, he is entitled, if the taxing officer is satisfied of such fact, to tax for himself the same witness fees as if he were not a party, but the taxing officer can take no notice of abortive attempts to bring the case to trial.

THIS was an appeal by both parties from the decision by the local registrar at Sandwich in respect of certain witness fees under the circumstances set out in the judgment. The appeal was argued before RIDDELL, J., in Chambers, on March 17th, 1908.

L. G. McCarthy, K.C., for the plaintiffs.

W. E. Middleton, K.C., for the defendants.

March 19. RIDDELL, J.:—The action was a very important one, involving half a million of dollars. It was tried before me at Sandwich, and resulted in a judgment for the plaintiff for \$500,000. Upon the taxation of costs, the local registrar allowed as witness fees:—

1. For C. S. W. Barwell, \$1,020; the plaintiff claims \$1,760.
2. For Chas. Boyle, \$630; the plaintiff claims \$1,760.
3. For plaintiff Joseph Boyle, \$22.50; the plaintiff claims \$300.

Upon these three items the plaintiff appeals, and as to the last the defendants also appeal, claiming that no allowance should have been made. The local registrar also allowed:

4. For A. N. C. Tredgold, \$500; the defendants claim that this is excessive.

1. As to the Barwell fees, it appears on affidavit that he is a Dominion land surveyor (at the trial it further appeared that he practises as a civil engineer, residing in the Yukon Territory); that in matters of ordinary business persons in his profession charge \$35 or \$50 a day, according to the length of time they

are employed; and that the Courts in the territory allow \$25 a day fees for such a person; that he (B.) made a contract with the representative of the plaintiff that he was to receive \$1,000 professional fee and all his travelling and living expenses until his return to the Yukon, and that he would not have attended the trial for any less sum. It further appears that before the representative of the plaintiff closed with Barwell on these terms, he consulted a prominent barrister in the Yukon Territory, and that barrister said that he thought the terms exceedingly reasonable, and advised his client to accept them at once. The local registrar has allowed only \$510 of the \$1,000 charged; and, while the witness was paid \$510 for travelling expenses and \$250 for expenses, the local registrar has allowed for the two \$510.

I think the case of *Ball v. Crompton Corset Co.* (1886), 11 P.R. 256, covers this matter. "The guiding rule in such cases is thus expressed in Morgan on Costs, 2nd ed., p. 43: 'If a foreign witness, who is not accessible by subpoena, but whose evidence is material in the case, refuses to leave his house unless he is remunerated for his trouble, the compensation paid to him, if reasonable in amount, will generally be allowed and taxed against the losing party.'"

Admittedly the time of the absence of the witness from home is not less than 51 days; there is no evidence upon which it could be held that \$1,000 and expenses would not be a reasonable, but an excessive, amount, and unless there exist some good reason for disallowing the amount, it should be taxed.

I have refreshed my recollection of this witness's evidence at the trial, and I am clear that it would not have been safe for the plaintiff not to have had his evidence; and I am equally clear that it was reasonably necessary to have him in person at the trial, and not rely upon evidence to be taken on commission.

The appeal will be allowed. Then, as to the amount, the travelling expenses and living expenses have been allowed at \$510. Upon the evidence before me I see no reason to change this. The amount of witness fees for this witness then will be $\$1,000 + \$510 = \$1,510$.

2. Charles Boyle is the brother of the plaintiff, and in his employ at a salary of \$5,000 per annum, "paid by the year." He was called by the plaintiff from the Yukon to give evidence at the trial, and the plaintiff "allowed him for three months'

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wages." He was taken from his work at the Yukon, where he otherwise would have been employed, and brought to Ontario to give evidence at the trial of this action. I cannot see that this is at all like the case of Barwell. This witness was at the call of the plaintiff, and obeyed the call. It is not the case of a foreign witness refusing to come except he were paid certain remuneration. No doubt the plaintiff lost a substantial amount of service by the absence of his servant from his work, but so does every business house unfortunate enough to be drawn into litigation and obliged to have clerks or employees attend a trial, and so neglect their regular work.

The appeal will be dismissed.

3. The position of a party litigant who gives evidence on his own behalf is, perhaps, not wholly satisfactory. At the common law there was no right to costs, although it is said that the expenses a plaintiff was put to in asserting a just claim was taken into consideration in fixing the damages. Beginning with the statute of Gloucester (6 Edw. I. ch. 1) a number of statutes provided that the successful plaintiff should have costs, and later the case of a successful defendant was provided for. But it never has been the theory of the law that all the expenses a litigant may incur shall be paid by the losing party. A successful litigant attending the trial, when he is not a necessary and material witness, cannot charge his expenses to the other side. Until a comparatively recent date a litigant could not give evidence at the trial. He might, and often did, attend to direct, consult, advise, observe, but he could not charge his unsuccessful opponent with his expenses for so doing. When the change was made permitting the litigant to give evidence, the Courts in England held that if the litigant was a necessary and material witness, he might and should be allowed expenses, etc., on the taxation of costs. The change allowing (except in special named cases afterwards provided for by (1869) Imp. 32 & 33 Vict. ch. 68) parties to an action to give evidence on their own behalf came into force August 7th, 1851, Imp. 14 & 15 Vict. ch. 99, after an experiment of allowing such evidence in certain courts (1846) Imp. 9 & 10 Vict. ch. 95, had proved successful. In an action in which the writ was issued the very next month after the passing of the Act Imp. 14 & 15 Vict. ch. 99, and tried in the following January, the plaintiff was called

as a witness on his own behalf, and the Master allowed on taxation the sum of £40 for subsistence money for the plaintiff, he having remained in England for the purpose of giving evidence. He could only make out his case by his own evidence or by sending a commission abroad; and the Master allowed him the same sum for maintenance as would have been allowed a third person as witness under the like circumstances. Upon appeal it was held that the Master was right: *Howes v. Barber* (1852), 21 L.J. N.S.Q.B. 254. Lord Campbell, C.J., giving the judgment of the Court, says (p. 256): "The party is now by law admitted as a witness; he may be a material and necessary witness, and his attendance may not only obtain justice for himself, but lessen the expense. . . . The reasonable expenses to which the plaintiff is put by being obliged to attend and be examined as a witness to enforce payment of a just demand . . . should be thrown on the wrongdoer. . . . We must trust to the intelligence and the vigilance of the taxing officers to detect and to frustrate attempts . . . to swell costs unnecessarily under the pretext that the parties were necessary or material witnesses. The simple fact of their being examined as witnesses must by no means be considered sufficient to establish a claim for their expenses as witnesses, and if it appears that their attendance was unnecessary or that they attended to superintend the conduct of the cause, the claim ought to be rejected."

So in the Court of Common Pleas, a few years thereafter, it was similarly held: *Flower v. Gardner* (1857), 3 C.B.N.S. 185. The defendant apparently had not intended to give evidence, but being in court and observations being made by the plaintiff's counsel on account of his not being put in the box, he was thereupon called as a witness. He was taxed £15 10s. for travelling expenses and attendance, and upon appeal the taxation was upheld by the full Court. The whole point in the case was taken to be whether the defendant was a necessary and material witness. Williams, J. (at p. 188), says: "The fair test is, what would counsel have recommended if advising on the evidence? I cannot help thinking that he would, under the circumstances have considered the defendant's presence necessary; and I think the defendant's attorney would have failed in his duty to his client if he had not had him in court. If so, it follows that the

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item in question does not fall within the class of extra costs, but was an expense created by the attendance of a witness the defendant was bound to have present." These cases are still law.

Beyond any question no counsel in his senses would have thought of going on with the trial of this case without the evidence of the plaintiff, and that *vivâ voce*, if at all possible. It is more than doubtful that he would have succeeded had he not attended and given evidence.

It is said, however, that he has not made a sufficient affidavit of disbursements under Con. Rule 1173. He says:

"27. I was also a necessary and material witness on my own behalf in this action, and, upon the advice of my solicitor in this action, I did attend at the said time and place as such witness when the said action was so disposed of." It is claimed that the affidavit should have negatived the attendance at the trial for the purpose of superintending the conduct of the case. No doubt this is the usual form of affidavit of disbursements (the old affidavit of increase) for years in use in Ontario, but I do not think it is at all necessary, unless possibly the taxing officer should see fit to require it, in the exercise of that vigilance desiderated by Lord Campbell. The forms in Chitty's Forms, 12th ed., pp. 364, 365, do not contain such a clause. It is for the taxing officer to satisfy himself by examination of the party or otherwise whether the party was in fact a necessary and material witness, and that his giving evidence was not a mere plan to be allowed his witness's fees. I do not think that the test is, "Would the party not have attended the trial in any case, even though he should not require to be called upon to give evidence?" but it is as put by Mr. Justice Williams in the case cited from 3 C.B.N.S.

Then it is argued that the examination of the plaintiff puts him out of court. He says: "I make up my fees, \$300, as follows: I came here three times from New York. The car fare and sleepers is \$37 return fare. I have not lived in Dawson since my association with the Canadian Klondyke Co. I have not been in the Yukon for three years. I was engaged at the trial for two or three weeks. I could be engaged for, say, a week in coming, attending the trial, and returning. . . . I had no other business here but to prepare for the trial. I was here on April 29th for the purpose of attending the trial, and also on June 5th, when the trial was to have been at Chatham. My principal

business is at Dawson, and I would have been there if not for the trial herein." In the affidavit of disbursements he had sworn that notice of trial had been given for the sittings of the Court at Sandwich for April 29th, 1907, and at Chatham for June 5th, 1907; and that he had come from New York in order to attend at the time and place mentioned in all three notices of trial.

The local registrar has allowed as for an attendance at the actual trial of a witness coming for that purpose from New York, and I think he is right. Certain witness fees are, I think, taxable. I can find no authority for saying that the practice in that regard of our courts is different from that of the English courts. Con. Rule 1173 is taken from the New Rules of Practice of the Q.B. & C.P. of T.T. 1856, r. 165, and that is practically the same as the English rule. It is true that our Legislature, less courageous than that of the mother country, had not yet allowed parties to give evidence in their own cases, but when, step by step, legislation was passed, it was almost, if not quite, word for word the same as that in England. The Rule 165 and its successor, the present Con. Rule 1173, prescribe no special form of affidavit by the aid of which the taxing officer may exercise the vigilance spoken of. It is open to the taxing officer to call for such evidence as he may reasonably require to satisfy him of the validity of the claim; and all the facts appearing, he is to decide.

As to the amount, the taxing officer can take no notice of former attempts at bringing the case to trial. The costs of such are not provided for; nor can he allow anything for attendances to instruct or advise or consult solicitor or counsel, if there were any. He must tax as though the plaintiff had come to Sandwich as a witness upon this trial. This he has done, and the appeal of both parties must be dismissed.

4. What I have said covers the case of Mr. Tredgold. The appeal in that respect will also be dismissed.

In the result, the witness fees allowed should be:

For Barwell ..	\$1,510.00	as against present allowance..	\$1,020.00
For C. Boyle..	630.00	" " "	630.00
For plaintiff ..	22.50	" " "	22.50
For Tredgold .	500.00	" " "	500.00
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\$2,662.50		\$2,172.50	

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Of the five appeals the plaintiff has succeeded in two; the defendant in two. In the other the plaintiff has succeeded in part and failed in part. I do not think that the fact that this appeal involves the least amount of any is of consequence—the maxim is true in this case, which is attributed to a very eminent Judge, now deceased, that the less there is involved in a case, the more intricate and extended the argument the time varies indirectly as the weight. In saying this, I do not mean that here there was a word said more than was necessary. There was not. The argument of both counsel was concise, accurate and able.

The plaintiff wins in two, loses in two, and the fifth is a partial success. There will be no costs.

A. H. F. L.

[IN THE COURT OF APPEAL.]

McGUIRE V. GRAHAM.

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April 21.

Principal and Agent—Vendor and Purchaser—Name of Manager of Vendor's Agent inserted in Sale Agreement as Purchaser—Ignorance of Vendor—Assignment to Real Purchaser—Specific Performance.

A sale of land was arranged between the agent of an intending purchaser and the owner's agent, the owner accepting the purchaser's offer although ignorant of his name. The purchaser refused to allow his name to appear in the agreement, which had been prepared by the vendor's solicitor with a blank for the purchaser's name, on the ground that it would affect other purchases which he proposed making in the neighbourhood. The office manager of the vendor's agent then inserted his own name as purchaser, with the object, as he said, of preventing the sale from falling through. Neither the vendor nor her solicitor knew of the position of the ostensible purchaser, and on the vendor inquiring who he was, was merely informed by the purchaser's agent that he was a "responsible person," upon which the vendor signed the agreement, which was then assigned to the plaintiff. A few days after a draft deed had been submitted and the deposit made, the vendor discovered who the nominal purchaser was and refused to carry out the sale:—

Held, that the sale could not be supported, as there had not been a full and fair disclosure of material circumstances in connection with the transaction, in leaving the vendor in ignorance of the position of the purchaser as the representative of the vendor's agent.

Judgment of the Divisional Court reversed, and that of the Judge at the trial restored.

THIS was an action brought for the specific performance by the defendant, Mrs. Graham, of an agreement for the sale to George A. Hill of certain property in the city of Toronto, known as street No. 190 on the north side of King street, for the price of \$9,000.

The action was tried before MACMAHON, J., without a jury, at Toronto, on June 18th, 1907.

C. Miller, for the plaintiff.

G. H. Kilmer, K.C., for the defendant, Mrs. Graham.

J. A. Rowland, for the defendant Hill.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully stated.

July 3. MACMAHON, J.:—I find that the property in question was a year and a half ago placed in the hands of Mr. A. G. Strathy to sell, Mrs. Graham, the owner, stating that she was willing to take \$8,000 for it. Some months after it was placed in Mr. Strathy's hands he had an offer of \$7,800 for it, which would have been accepted and the sale made had not some difficulty arisen because

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one of the tenants on the property demanded what was thought to be an unreasonable sum to vacate, and while the intending purchaser was prepared to pay a share of what the lessee demanded, Mrs. Graham was not willing to make up the difference, and so the deal fell through.

During the last days of December, 1906, Harton Walker, an estate agent, had been instructed by the plaintiff, George McGuire, to purchase sixty feet of land on King street, without restricting him as to price. Walker went amongst the estate agents to ascertain what properties were for sale. Less than sixty feet would be, according to McGuire's evidence, no use to him, because he required extensive premises for his business. Walker called at Strathy's office on the 31st of December and asked what properties he had for sale, and this property, No. 190 King street, was mentioned, and the defendant Hill, who was the manager of the office, said that the price when the property was first placed with them was \$8,000, but he thought it could be bought for \$9,000, and he at once communicated by telephone with Dr. Graham, who acted for his mother, the owner, telling him he thought he could get \$9,000 for it. Dr. Graham, after consultation with his mother, said that that sum would be accepted, but that any less offer would not be entertained. That was at once communicated to Walker, who stated that McGuire did not wish his name mentioned in connection with the intending purchase, because he was apprehensive that the owners of other properties he might desire to purchase would put up their prices. John Strathy (a nephew of A. G. Strathy) on the same day presented to Mrs. Graham an option which he desired her to sign, and which she did sign and gave to Dr. Graham, telling him that if it was not in every way satisfactory to her solicitor, Mr. Smith, it was not to be used. It was left with Mr. Smith, who objected to any offer or option coming from his client, and that document contained a three days' option. He at once prepared an agreement in duplicate which he handed to John Strathy, and this was submitted to Mr. Walker for his client to sign. Walker said his client would not sign it, that he did not want to be known as the purchaser, and Mr. Hill, being apprehensive that the deal would fall through, said, "I will insert my name in the blank left for the intending purchaser, and push it through." Having done this, he went with them to the office of Mr. Smith, who saw Hill's name

there as the intending purchaser. A question was asked by Smith as to what position Hill held, which caused Walker to conclude that Smith knew Hill but did not know what position he held in Strathy's office. Walker did not know what his position was, and replied that he (Smith) must ask Strathy. They then went to Mrs. Graham's house, and Mrs. Graham said that before she signed the document she asked who Hill was, and that Walker replied, "You need not have any hesitation about signing that, as he is a perfectly reliable person." Hill's name, according to Mrs. Graham's recollection, was not mentioned. However, Hill was spoken of at some time during the conversation.

The strongest evidence against Mrs. Graham are the letters of Harton Walker to Mr. Smith, dated the 2nd of January, and Mr. Smith's reply thereto, dated January 4th.

Walker's letter reads:—

"Enclosed please find my cheque for \$100, as deposit re sale of No. 190 King street west.

"To cover your objection, and to satisfy the real purchaser, Mr. Hill made the offer to Mrs. Graham, and he has since assigned over all his right, title and interest in the agreement to the real purchaser, Mr. George F. McGuire, of the firm of Messrs. W. J. McGuire & Co., No. 86 King street west, who will take the deed from Mrs. Graham and make the mortgage under the terms of the agreement.

"I will let you know during the day what firm of solicitors will act for Mr. McGuire.

"Trusting this will be satisfactory, I remain," etc.

Mr. Smith's reply is as follows:—

"Re Graham & Hill—

"Enclosed please find draft conveyance of 190 King street west for revision and approval."

The opening words of a sentence in Walker's letter, "to cover your objection," refer to the objection made by Mr. Smith to the first offer as not coming from the intending purchaser.

Mrs. Graham was in Smith's office at the time the letter arrived, and Smith handed the cheque to her and said he would prepare the draft conveyance, which he did, leaving a blank for the name of the grantee, and sent it to the solicitors for the intending purchaser McGuire, apparently indicating that there was no objection to the

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intending purchaser, and that Mrs. Graham was perfectly willing to accept any purchaser, as long as he was financially in a position to carry out the terms of the agreement.

The defendant Hill, in acting in this matter, says he thought he was conferring a benefit on Mrs. Graham; that after having received from her the upset price he naturally felt anxious that the sale should go through, and whatever he did he had but one object in view, the interest of his principal's (A. G. Strathy's) client. Beyond the commission to be received from Mrs. Graham, and which, according to custom amongst brokers, was divided with Walker, he had no interest in the sale.

There is just a word to be said about other properties sold in that vicinity. Mr. McGuire purchased through Walker Nos. 192 and 194. At the rear of one there was a brick warehouse, which cost \$2,000, and Walker said in order to get the properties he had to purchase the business of both the occupants of those premises; that the price to be paid for the land in each case was \$10,000, but that the businesses which he had to take over, and without which he could not have procured the properties, were each valued at \$5,000. There was another property, No. 119, which was sold for \$10,000 shortly after the sale of Mrs. Graham's property. So that I think the price which Mrs. Graham gave to Strathy at which to sell was not far from its outside value. Perhaps had the property remained on the market for some time longer a higher price could have been obtained for it; but at that time Mr. Hill, having a single eye to the interests of Mr. Strathy's client, endeavoured to get and did get a purchaser for the place.

I will deal with the question of law when I have had an opportunity of looking at the cases.

The question for decision simply resolves itself into this: Is Mrs. Graham, the vendor—who was, as she stated, ignorant that the defendant Hill, with whom she entered into the contract of sale, was the manager of the business of Mr. Strathy, her agent and broker for the sale of the property—bound thereby?

Although Hill was, as I found at the conclusion of the trial, actuated by a desire to carry out the sale, solely for the benefit of Mrs. Graham, his non-disclosure that he was her agent for sale rendered the sale to him invalid, at her option, on discovering that

he was simply the clerk and manager of the business of her agent, Mr. Strathy.

In *McPherson v. Watt* (1877), 3 App. Cas. 254, the headnote to which is as follows: Where "an advocate in Aberdeen, who is the same as a solicitor elsewhere," (and who was also a broker in the purchase and sale of estates) "purchased nominally for his brother, but really for himself, certain houses the property of two ladies for whom he was agent, concealing from them the fact that he was buying for himself," it was held that the purchase could not be enforced.

Lord Chancellor Cairns, in his judgment, at p. 264, said: "Assume . . . that in every respect . . . this was a sale which might have been supported, had the Macpherson family 'the ladies' been told that Watt was the purchaser . . . it cannot be supported from the circumstance that that fact was not disclosed to them; and at p. 263. . . If there had not occurred that unfortunate circumstance, which did occur, the concealment of the fact—I use the term 'concealment' in no offensive way, perhaps I had better say the non-disclosure of the fact—that Watt was himself the purchaser of two of the houses, if there had not been that element in the transaction, I, speaking for myself alone, should have been very loath, upon all the other facts of the case, to have held that this might not have been a transaction capable of being supported as between Watt and McPherson."

Lord O'Hagan said, at p. 266: "Though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly, in the name of another without communication of the fact to the vendor, the law condemns and invalidates it utterly."

In *Mollett v. Robinson* (1872), L.R. 5 C.P. 646, at p. 655, Willes, J., said: "It is an axiom of the law of principal and agent, that a broker employed to sell cannot himself become the buyer, nor can a broker employed to buy himself become the seller, without distinct notice to the principal, so that the latter may object if he think proper." When that case reached the House of Lords (L.R. 7 H.L. 802) on appeal from the Exchequer Chamber, Mr. Justice Mellor (who was one of the Judges summoned to answer a question submitted by the House), at p. 815, quoted with approval the above extract from the judgment of Willes, J., in the Court below.

And the headnote to *Dunne v. English* (1874), L.R. 18 Eq. 524,

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is: "An agent for sale who takes an interest in a purchase negotiated by himself is bound to disclose to his principal the exact nature of his interest; and it is not enough merely to disclose that he has an interest or to make statements such as would put the principal on inquiry."

In *Murphy v. O'Shea* (1845), 2 J. & L. 422, Lord Chancellor Sugden, at p. 424, said: "It is also said that there is no proof that the lands were sold at an undervalue; but it is perfectly well said that it is not necessary to prove undervalue. A principal selling to his agent is entitled to set aside the sale upon equitable grounds, whatever price may have been obtained for the property."

Mr. Miller, for the plaintiff, referred me to a passage in Wright on Principal and Agent, 2nd ed., p. 15, where the author states: "There is, however, no objection to a person acting as agent for two parties to a contract where their interests are not in conflict, or where no discretion is given to him. In other words, where the agent's duties to either or both are merely ministerial (as where an auctioneer sells for the seller and signs the memorandum of sale for the purchaser), there the agent may act for both parties."

And also to this from Story on Agency, 9th ed., sec. 31: "It has been already suggested that a broker is for some purposes treated as the agent of both parties. But primarily he is deemed merely the agent of the party by whom he is originally employed; and he becomes the agent of the other party only when the bargain or contract is definitely settled, as to its terms, between the principals; for, as a middleman, he is not intrusted to fix the terms, but merely to interpret (as it is sometimes phrased) between the principals. It would be a fraud in a broker to act for both parties, concealing his agency for one from the other, in a case where he was intrusted by both with a discretion, as to buying and selling, and of course where his judgment was relied on."

The argument of counsel was that, as Mrs. Graham had fixed \$9,000 as the price at which she was willing to sell the property, the duties of her agent Strathy ended when he obtained a purchaser at such price, and he (Strathy) through Hill, in obtaining from his principal an agreement to sell at the price named, was merely acting as a go-between or middleman between the parties, and therefore was not violating any duty he owed his principal, the vendor.

In support of this argument counsel cited *Short v. Millard*

(1873), 68 Ill. 292: Where the owner of lands employed an agent to sell the same, agreeing that if the latter would find a purchaser at a fixed price to pay him \$500, which the latter did, it was held that as soon as the agent procured the purchaser his agency ceased, and his taking a retainer from the purchaser in order that he, the agent, might see to the proper execution of papers, was held no defence to an action brought by the agent against the vendor to recover the \$500 as on the ground that the agent has acted for both.

Siegal v. Gould (1872), 7 Lansing (N.Y. Sup. Court) 177, at p. 179, where plaintiffs were employed as "middlemen" only, to bring the parties together to enable them to make their own contracts, there is no conflict of duty in such a case. He does not make himself an adverse party to either principal, nor does either repose any special trust in him.

Rupp v. Sampson (1860), 16 Gray 398, the headnote to which is: "If a middleman brings together a seller and buyer, each of whom has agreed, without the knowledge of the other, to pay the middleman a commission on any contract which may be made between them, and a contract is made between them, in the making of which the middleman takes no part as agent for either, the conduct of the middleman in concealing from each his agreement with the other is not fraudulent, and is no defence to an action brought by him against either to recover the commission agreed upon." Bigelow, J., says: "We can see nothing in the conduct of the plaintiff which was fraudulent or which operated to deceive. . . He made no false representations to them. . . Both contracts are valid. . . He was not an agent to buy or sell, but acted only as a middleman to bring the parties together, . . . and was indifferent between them," the buyer and seller.

In *Mullin v. Keetzleb* (1870), 7 Bush. (Kentucky) 253, the agent brought the parties together who made an exchange of land. The agent had no other agency in the exchange than this and writing out the deeds. It was held that the agent was entitled to the customary commission from each party. Robertson, C.J., said: "Had they" (the agents) "negotiated between the parties, and in any degree thereby influenced them to make the trade," it would have been different.

And *Ranney v. Donovan* (1889), 78 Mich. 318, the headnote to which is: "A broker who merely brings the parties together and has

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no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them although each was ignorant of his employment by the other."

In *Short v. Millard, supra*, the respondent (Millard) was retained as broker by Short to procure a purchaser at a sum fixed by Short for his property. Millard procured a purchaser at that fixed price, and the vendor and purchaser entered into an agreement for the sale and purchase of the land without the intervention of Millard. His agency having ended, there was no breach of duty in his being retained by the purchaser to see to the due execution of the conveyance by the vendor.

In all the other cases cited the respective agents merely brought the parties together and the exchanges were made without the agents' intervention. And as the agency ceased when the parties were brought together, the agent bore no fiduciary relationship to either party.

During the argument I entertained the opinion that as Mrs. Graham, the vendor, had advised Strathy that she would accept \$9,000 for the property, Strathy's offer through the defendant Hill might be regarded as merely bringing the vendor and intending purchaser together, and would therefore come within the cases in the United States Courts, cited by Mr. Miller. But after considering those cases, I am satisfied they do not apply to the present case. What was done was not merely bringing the vendor and the intending purchaser together and leaving them to consummate a bargain, but Hill, the manager in Strathy's office, made an offer for the property as the actual intending purchaser, which was accepted by Mrs. Graham in ignorance of his being the representative of Strathy, her agent. When she asked who Hill was she should have been informed that he was an employee in Strathy's office, and, on being so informed, if she executed the contract she would have been bound.

There will be judgment for the defendants dismissing the action; as against the defendant Mrs. Graham with costs, and as against the defendant Hill without costs.

From this judgment the plaintiff appealed to the Divisional Court.

On October 22nd, 1907, the appeal was heard before FALCONBRIDGE, C.J.K.B., BRITTON, and RIDDELL, JJ.

C. Miller, for the appellant.

G. H. Kilmer, K.C., for the respondent, Mrs. Graham.

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December 18. FALCONBRIDGE, C.J.:—The law governing this class of cases is not at all in dispute, but is well settled.

But in this particular case we have to regard the substance and not the mere form of the transaction. There is no suggestion of any fraud or underhand dealing to the prejudice of the defendant. There was no question as to who was the real purchaser. Hill's name was used for the sake of convenience. Both parties agreed on the terms of the contract without Hill's interference.

The circumstances are so exceptional that the affirmance of the contract does not effect any impairment of the general doctrine laid down by so many authorities.

The appeal will be allowed with costs, and the plaintiff will have the usual decree for specific performance with costs.

BRITTON, J.:—This is an action brought for the specific performance by the defendant Graham of an agreement between the defendants for the sale by Mrs. Graham to George A. Hill of property in Toronto, known as street No. 190 on the north side of King street, for the price or sum of \$9,000.

The agreement is dated 31st December, 1906, and on the same day the defendant Hill assigned the agreement and all his rights under it to the plaintiff McGuire.

The action was tried at Toronto by McMahon, J., without a jury, on the 18th June, 1907, and judgment was given on 3rd July, 1907, dismissing the action.

I am of opinion that the decision of the learned trial Judge is right and should not be interfered with.

The plaintiff claims and brings his action as assignee of Hill, and has no higher rights than Hill.

There is practically no conflict of testimony between the parties. In the view I take of this case the facts may be taken precisely as put by the plaintiff, and upon these the plaintiff ought not to succeed.

It is clear that Mr. Strathy, in whose office Hill was managing clerk, was the agent of the defendant to find a buyer if he could, in

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the regular course of his agency, and to introduce such buyer to the defendant, and to find and introduce if he could the person who would pay the highest price for defendant's property. The Strathy office had this property on its list for about a year and a half. During that time an offer of \$7,800 had been made, it is said, and accepted by the defendant, but the sale fell through for some reason, not material or necessary now to consider. It is said that the property was "listed" with the agent at the sum of \$8,000.

It sufficiently appears, I think, that the demand for land in that locality was increasing and the prices were advancing. Mr. Harton Walker knew that this land was in the hands of Mr. Strathy for sale, and knew Mr. Hill. Mr. Walker had a client who wanted, upon certain conditions and in a certain contingency, to buy, but he would not make an offer to buy from defendant Graham, and he did not make any offer either to Graham, or to Strathy for her, to buy this land in question. Mr. Walker knew the plaintiff would in fact buy if the price were right, and so Mr. Walker, acting for the plaintiff, was in duty bound to get the price as low as possible in any fair purchase. Mr. Walker's interest was directly adverse to the interest of the defendant Graham. Mr. Walker, acting for the plaintiff, went to Hill. Hill himself, without getting any offer, named the sum of \$9,000 as a price he thought the defendant would accept. Mr. Walker had not suggested that sum or any sum. I am at a loss to understand why Mr. Hill, in the presence of a shrewd real estate agent who would not disclose the name of his client, should so readily and without more information, and without communication with the defendant, name the price at \$9,000. If Mr. Hill was not, as he says, to influence the defendant Graham in any way, why did he not in the changed conditions ask Mrs. Graham to name the price she would be willing to accept? I see no reason why Hill, as the agent for Mrs. Graham, and being in close touch with real estate, should not have fully considered the situation and have advised the owner.

Assume that everything was honest and right in this case. It is because there is the opportunity to do wrong, and the temptation to do wrong, that Courts have decided that an agent for the vendor shall not be the buyer unless there is full disclosure to the vendor of the fact that the agent is himself the buyer.

The learned trial Judge has found as a fact that "Hill, the

manager in Strathy's office, made an offer for the property as the actual intending purchaser, which was accepted by Mrs. Graham in ignorance of his being the representative of Strathy, her agent."

There is ample evidence to warrant that finding. Hill was in fact the buyer.

The right of action, as in the statement of claim, is based upon its being an actual purchase by Hill. If Hill was buying for an unknown person, who had given no authority and was not bound in any way to accept the property, he was no less an actual buyer.

The plaintiff does not in his statement of claim say that Hill was acting for him, but having the assignment from Hill asks to stand in Hill's place, and to have the agreement carried out as Hill would if the plaintiff. Hill, for the reasons stated, has no right to have this agreement specifically performed.

I cannot think that the law is such as to uphold a transaction such as this, where the agent of the vendor and the agent of the purchaser can together put in an offer to buy in the name of vendor's agent, and if accepted take the chance of some person standing in the dark taking the property at the price, or of selling it in the open market, with the chance of profit great or small in the transaction. In this case the situation is even worse, because Mr. Walker, although acting for plaintiff, did not get a commission from him, but expects to get a share of the commission to be paid by vendor.

I am not at all criticizing the custom, if it be a custom, of the agent of the vendor giving up a part of his commission to another real estate agent who introduces a buyer, but in such a case surely the buyer so introduced must be a person giving his name, and not the seller's agent, who of his own motion, or at request of the buyer's agent, puts his name in as the purchaser. It does not mend the matter one whit for the agent to say "he intended it for the best—that he only did it to help the sale along." What Hill did was in fact for his own benefit. It must be assumed to be so, or he would not have done it. He did not expect to keep the land, but until it was taken off his hands he was a buyer for his own benefit, and without realizing any profit from a sale of the land, or an assignment of the agreement if the offer was accepted, it was for his own benefit or the benefit of his employer Mr. Strathy, who was Mrs. Graham's agent.

Upper Canada College v. Jackson (1852), 3 Gr. 171, is in point.

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The offer itself stipulated the sale if made was through A. G. Strathy as Graham's agent, and the acceptance included paying that agent the usual commission.

It is not a question of good or bad sale for the defendant. What was done in this case was a violation of a well-known and well-settled principle of law, that a man cannot be my agent to sell and a buyer of the same property, either in his own name or in the name of another, without my full knowledge and consent. It seems to me perfectly good law, as good to-day as when commended by Lord Wynford in *Rothschild v. Brookman* (1831), 5 Bligh N.R. 197: "If any man who is to be trusted places himself in a position in which he has an opportunity of taking advantage of his employer, by placing himself in such a situation, whether acting fairly or not, he must suffer the consequence of his situation."

The plaintiff cannot complain. His agent Walker knew and acquiesced in all that Hill did—in short, it was plaintiff's own act in withholding his name that led to the irregular and improper offer by Hill to buy.

Why should not the owner of property in every case know, before he accepts an offer to purchase, the name and, so far as it can be ascertained, the position of the proposed purchaser?

If an agent gets a reasonable offer from any person to purchase property, the agent is not bound to submit more than is known to him; but if the name of the proposed purchaser suggests a use or probable use of the property that would warrant an increase in the asking price, I think the agent should, in fairness to his principal, communicate all such information. How much more is it necessary for an agent, who for any reason, however honest, proposes to buy from his principal, to make full disclosure? I cannot divest myself of what seems to me most important in the community of interests in this case on the part of the agent of the plaintiff and the defendant Hill—both interested in sale going through. Walker wanted the property cheap. Hill wanted to get for defendant \$9,000, without any information as to either the name of the purchaser or intended use of the property, and both interested in the commission which the defendant Graham was to pay. Is it too much to say that the fact of the commission was not lost sight of in the hurry of completing a sale on 31st December, 1906?

This business seems to have been mainly managed by Walker.

Hill had really very little to do, and did very little except in the way he ought not—namely, as a buyer.

In Walker's evidence, after speaking of Strathy's name being down as the selling agent of the property, he says:—

"I sent up to Strathy's office to ask what price they were asking for this property. The answer came back that they were not quite sure; the price on their books was \$8,000, but they thought an offer of \$9,000 might be accepted, and they would let me know.

"Q. Did they let you know?

"A. Yes, they said they had communicated with the owner, and they thought an offer of \$9,000 would be accepted.

"Q. And what did you do?

"A. Well, I went on finding out particulars of the other two properties. . . .

"Q. Then which of the three did you commence to buy?

"A. Well, I commenced with the east one, because the price reported on that was the lowest, and McGuire thought if he could get the three it would average up. . . .

"Q. Then who prepared the offer?

"A. Well, in conversation with Strathy, I told him I could not get my client to sign an offer.

"Q. Why not?

"A. He did not wish to be known in the transaction. I said if you can get an offer to sell signed for a day or two, I can get it accepted; so Strathy said 'all right, send up the offer to sell'; so I drew it up on the terms McGuire was willing to buy on, and sent it up to Strathy's office."

Hill puts his whole case in a nutshell. He states that he had no authority to negotiate about the price. He had to submit any offers—that is all he had to do—that his whole duty was to find a purchaser; that "Mr. Walker hunted me up"; that he said to the doctor, who is the son of and was acting for defendant Graham: "We have a person wanting to buy your property; what is the best price for it? I think I can get \$9,000."

Hill sent up Walker's prepared offer to sell for \$9,000, in blank, for Mrs. Graham to sign. Her solicitor would not permit any offer to sell to be given. The plaintiff would not sign any offer to buy. The negotiation was then at an end. The parties were quite within their rights. Then, after Walker had said, "No, he won't

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sign that paper—he has signed papers before, and they have traded on that,” Hill stepped into the breach, absolutely on his own account in law and in fact, and said, “Well, I will sign it myself and run the risk.”

“Q. Of getting it through?

“A. Yes.”

Then Hill appeared before Mr. Smith, not as defendant's agent, but as the real purchaser, as Mr. Smith supposed, and acted as such real purchaser in changing the offer in so important a particular as increasing the rate of interest to $5\frac{1}{2}$ per cent. from 5 per cent. on the part of the purchase money to remain on mortgage.

Mr. Smith did not know Hill as from Strathy's office, and so took the offer and had it accepted by the defendant Graham.

I am unable to see how in law specific performance can be ordered, under the special circumstances of this case, in favour of the plaintiff, of the contract made by the defendant Graham with her own agent's managing clerk.

The cases cited by the learned trial Judge, and others to which we were referred upon the argument, amply support the judgment appealed from. It will be seen that the offer to sell—which is of no force as it was not handed over—was not properly signed. This is only of importance—if important at all—as shewing that defendant was not a business woman.

I think the appeal should be dismissed with costs.

RIDDELL, J.:—The defendant, Mrs. Graham, the owner of certain land, and the plaintiff, an intending purchaser, were both willing, the one to sell, the other to buy, this property at a price fixed.

The owner (through her solicitor) was objecting to sign a certain form of offer to sell; the purchaser objected through his broker to have his name appear on any offer to purchase. In this impasse, the defendant Hill, an employee of the plaintiff's real estate broker, offered, himself, to sign the contract for sale and to take the risk of getting it through. He did so, it being the understanding that he should at once assign to the plaintiff.

The defendant Mrs. Graham appears at the time the contract was signed not to have known who the defendant Hill was. Hill at once assigned to the plaintiff. All this took place on December 31st, 1906. Upon the 2nd January, 1907, the first working day thereafter,

the solicitor for the defendant Mrs. Graham knew of the position of Hill, but on January 4th he sent a draft conveyance.

Hill had nothing to do with fixing the price or the terms of sale.

Under these circumstances, I think as the learned trial Judge thought at the trial: "He (Hill) was a mere conductor in getting this transaction through." It can not be said that Hill was in fact the real purchaser; all that he was doing was in the supposed interests of his master's principal, assisting in carrying out a proposed sale by lending his name. He was, it is true, incurring a liability on the faith of an understanding with the plaintiff, and might have got himself into an awkward situation if the plaintiff for any reason should be unable to accept the transfer and carry out the purchase, but that we need not consider.

The cases cited by the learned trial Judge upon the question of the duty of an agent to his principal and the right of a principal to repudiate a sale to an agent, lay down rules about which there can be no question, but they do not, in my humble judgment, apply under the facts of this case.

I would allow the appeal with costs, and give the plaintiff the usual judgment for specific performance with costs.

From this judgment the defendant appealed to the Court of Appeal.

On February 19th, 1908, the appeal was heard before Moss, C.J.O., OSLER, GARROW, and MACLAREN, JJ.A., and TEETZEL, J.

G. F. Shepley, K.C., and *G. H. Kilmer*, K.C., for the appellants. The judgment of the Divisional Court cannot be supported. The judgments of the majority of the Court are based on the ground that what was done by Hill was done in Mrs. Graham's interest, to enable the sale to be carried out, and without any intention to defraud or deceive her, and that it was immaterial that Hill's position, as her agent's manager, was not made known to her. The fact, however, as to who the purchaser was, was considered of importance to Mrs. Graham. Her solicitor refused to allow the option signed by her to be carried out because the purchaser was unknown, and when he drew up the agreement he left a blank for the purchaser's name, the intention being that it should be filled in before being signed. Then, after Hill fills in his name, and the

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agreement is taken to Mrs. Graham to sign, and on her inquiring who Hill was, instead of her being told that he was her agent's manager, she is merely informed that he was a responsible person, thus withholding from her his true position, and thus practicing a deception on her. When Hill signed the agreement he was acting either for himself or for the plaintiff, and in doing so he would not be acting for Mrs. Graham. It is quite clear that Hill could not himself have maintained an action for specific performance, and the plaintiff, as his assignee, can be in no better position. If he be deemed a real purchaser, he could not maintain the action; nor could he do so if he were a mere instrument for purchasing the lands for McGuire. The agent must act in the interests of his principal, and must not put himself in a position in which he might act fraudulently if he so desired. The utmost good faith must be observed. The case referred to by Britton, J., *Rothschild v. Brookman*, 5 Bligh N.R. 197, lays down the law on the subject; that if any man who is to be trusted places himself in a position in which he has an opportunity of taking advantage of his employer, by placing himself in such a situation, whether acting fairly or not, he must suffer the consequences of his situation; and, as Britton, J., points out, this is just as good law to-day as when it was enunciated by Lord Wynford in that case. The same principle is laid down in *Upper Canada College v. Jackson*, 3 Gr. 171-175. Under the circumstances specific performance should not be decreed, and the judgment of the Divisional Court should be reversed.

C. Millar, for the respondent. In all the cases where specific performance has been refused, some deception has been practised, while here everything was open. Hill was acting in Mrs. Graham's interest, his whole object being to prevent the sale falling through, as he felt it was in her interest that it should be carried out, the price obtained being a good one. The whole duty of an agent is to procure a purchaser and nothing more, and when he procures the purchaser he has performed his duty and his agency terminates: Bowstead on Agency, 3rd ed., 182; Wright on Principal and Agent, 2nd ed., 15. The price was fixed, and what Hill did amounted to nothing more than bringing Mrs. Graham and the real purchaser together, and having done so his agency terminated, and he could properly sign the contract. No objection is now made to the terms of the sale or to anything contained in the contract. Then,

after the real purchaser is made known to Mrs. Graham, her solicitor makes no objection, but draws up the draft deed and submits it for approval. The whole difficulty has arisen, not because the purchaser was unknown, but because the purchaser gave a higher price for some of the adjoining land, and Mrs. Graham thinks that if she can now prevent the sale from being carried out she will be able to procure a higher price for her property.

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April 21. OSLER, J.A.:—I agree in the result.

If Hill was buying for himself—if he was the real buyer—specific performance cannot be enforced, for he was the vendor's agent, and without her consent he could not buy. For this it seems hardly necessary to refer to authority.

The plaintiff, as the assignee of the alleged contract, stands in no better position, as he had the fullest notice of this. If he was not buying for himself he was simply performing a trick, or practice or deception upon his principal, violating her express instructions that the real purchaser, who proposed to deal with her, must be disclosed to her before she would enter into any contract. This, too, was known to the plaintiff. It is evident that Hill was not trying to perform his duty to his principal by endeavouring to get the best price, and that he was simply acting with a single eye to secure his employer's commission.

I feel no hesitation, with all respect, in reversing the judgment of the Divisional Court and restoring the judgment at the trial.

The appeal must be allowed with costs throughout.

MACLAREN, J.A.:—This was an action for specific performance tried at Toronto by MacMahon, J., who dismissed it on the ground that the purchaser, whose rights under the agreement were assigned to the plaintiff, was the defendant Hill, the managing clerk of Strathy, the land agent in whose hands Mrs. Graham had placed the property for sale, and that this fact was not disclosed to her.

This judgment was reversed by the Divisional Court, Falconbridge, C.J., and Riddell, J., holding that the name of Hill was inserted in the offer to purchase as a mere matter of convenience, and that the real purchaser was the plaintiff. Britton, J., dissented, being in favour of affirming the trial Judge.

The law has long been well settled that if an agent enters into a contract with his principal he must make a full and fair disclosure

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of all the material circumstances and of everything known to him respecting the subject matter of the contract, and the onus of proving this is upon him: *McPherson v. Watt*, 3 App. Cas. 254; *Mollett v. Robinson*, L.R. 7 H.L. 802; *Upper Canada College v. Jackson*, 3 Gr. 171.

The plaintiff's counsel did not question this statement of the law before us, but said it was not applicable to this case, which he said was not a case of principal and agent at all, and that the name of Hill was inserted in the offer to purchase, and that he signed this offer, simply as a form and as a matter of convenience.

The material facts are not in dispute, there being no conflict of testimony except upon one point, which will be specially referred to later.

The facts may be briefly stated as follows:

Mrs. Graham, through her son, Dr. Graham, placed the property in question in 1905 in the hands of Strathy, a land agent, for sale, the price, on the advice of Hill, the manager of Strathy's real estate business, being then fixed at \$8,000. It remained unsold until the end of December, 1906, the price of property in the neighbourhood having meanwhile gone up considerably. About the end of December, 1906, the plaintiff desired to acquire a warehouse in the vicinity, and employed another land agent, Walker, to secure premises for him. Walker set about securing the property now in question and two adjoining properties. He learned from Strathy's office that the defendants' property stood on their books at \$8,000, and that an offer of \$9,000 would probably be accepted. He asked Hill to find out, and the latter telephoned Dr. Graham that he thought he could get \$9,000, and asking whether it would be accepted. Dr. Graham says he asked if this was a good price, and he was told that it was. This Hill denies. Dr. Graham, after consulting his mother, agreed to the \$9,000, and said no lower offer would be entertained, and named the terms. Walker, on being told of this, said his client did not wish to be known in the matter, as it might affect the price of the other properties. He then prepared an offer by Mrs. Graham to sell on the terms mentioned, which Strathy sent to her. She signed it on the condition that it was not to be delivered unless approved by her solicitor, Mr. Smith. The latter said he would not allow her to give what was really an option to an unknown purchaser, and embodied the same terms in

an offer from the purchaser (the place for the name being left blank), and sent it to Strathy's office. Walker and Hill discussed the situation, and finally it was agreed that Hill should sign the offer as proposed purchaser, which he did, and they both went to Smith's office. Walker was under the impression that Smith knew Hill, but in this he was mistaken. Hill had changed the rate of interest on the balance of the purchase money from $5\frac{1}{2}$ to 5 per cent. To this Smith objected. Hill changed it back to $5\frac{1}{2}$, and Smith and Walker went together to Mrs. Graham's house. On reading the offer she asked who Hill was, and Walker said to her, "You need not have the slightest hesitation in signing that, because he is a perfectly reliable party." She then signed the acceptance of Hill's offer. This was on December 31st, 1906. The same evening Hill executed an assignment of the contract to the plaintiff. On January 2nd Walker wrote Smith enclosing his cheque for \$100, the deposit agreed upon, and stating that Hill signed the offer to cover Smith's objection to the first offer and to satisfy the real purchaser, the plaintiff, who would take the deed and give the mortgage. Smith gave the cheque to Mrs. Graham, and on January 4th sent plaintiff's solicitors a draft deed. On January 6th Mrs. Graham for the first time learned that Hill was an employee of Strathy, and that the adjoining property was bought at a higher figure; and on January 7th Smith wrote plaintiffs' solicitors advising them what had been learned about Hill, returning Walker's cheque, which had not been cashed, and refusing to carry out the transaction.

It is conceded that the situation is the same as if Mrs. Graham had placed the property with Hill as her agent instead of with Strathy; or as if Strathy and not Hill had signed the offer to purchase, except that in the latter case Mrs. Graham and Smith would no doubt have known who the signer really was.

The trial Judge has not made a finding as to whether he credited the evidence of Hill or of Dr. Graham as to whether Hill said the price offered was a fair one, and I do not know that in the circumstances this is material. It was he who originally named \$8,000 as a fair price; he first named \$9,000 to Walker as the figure he thought the property could be got for; and he named \$9,000 to Dr. Graham as what he thought he could get for it. It was his duty to get the very best offer he could, and Dr. Graham would be justified in assuming that this was the very best price he thought

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he could get. And yet it is worthy of note that he should let Walker know that the property stood in their books at only \$8,000, and that he should suggest \$9,000 at once and no more, although he knew that Walker's principal must have had some good reason for concealing his identity, as suggested by Britton, J. The trial Judge has found that \$9,000 was a fair price, so that this point is of less importance.

In his statement of claim the plaintiff sets out the transaction as if Hill were really an intending purchaser, and that he assigned his contract to plaintiff.

In these circumstances the real question to be decided is whether the law as to dealings between principal and agent above quoted is really applicable to this transaction.

Hill claimed in his evidence, and plaintiff's counsel argued before us, that as Hill had not the fixing of the price and terms, and as he had only to find a purchaser, he was free to act as he did. Hill's agency, however, had not ceased until there was a binding offer and acceptance. When he signed the offer he was still Mrs. Graham's agent, and if his identity and the nature and extent of his interest were material it was his duty to disclose all these to his principal. There can, indeed, scarcely be any doubt as to the materiality of such information in the circumstances of this case. Smith had declined to allow his client to deal with an unknown purchaser, and Mrs. Graham asked, when Hill's offer was presented to her, who Hill was, and was assured by Walker that he was "perfectly reliable." If any further evidence of the materiality is required, it is furnished by Walker, who, when asked at the trial why he did not give to Mrs. Graham and Smith on December 31st the information about Hill and his interest contained in his letter of January 2nd, answered that in that case he might not have got his sale through; that Smith might have burked the sale, and insisted on McGuire signing the offer.

Both Hill and Walker say that Hill was taking the risk of McGuire's taking the property off his hands; and Hill says that he might have to take it himself or find another purchaser. If Hill had been the plaintiff seeking to enforce specific performance, can it for a moment be pretended that he could succeed? McGuire, as his assignee, can claim no higher rights. Even if neither Mrs. Graham nor Smith had taken no objections and had made no

inquiries, yet in order to uphold the transaction the onus would have been upon the plaintiff to shew affirmatively that full disclosure had been made. See *Savery v. King* (1856), 5 H.L. Cas. 627; *Ward v. Sharp* (1884), 50 L.T.N.S. 557; *Dunne v. English*, L.R. 18 Eq. 524.

It thus appears clear that if the plaintiff's claim is based upon the fact of his being the assignee of Hill it must fail; and it is equally clear that if Hill be regarded as the agent of McGuire in signing the offer the action cannot succeed. As already stated, Hill was at the time undoubtedly the agent of Mrs. Graham, and it would be an attempt on his part to serve at the same time two masters whose interests were diametrically opposed to each other. There is high authority for the statement that such an attempt must end in lamentable failure.

I am consequently of opinion that not only should specific performance not be decreed, but that it is such a transaction as would have justified the setting aside of a conveyance if one had been granted in ignorance of the real facts.

Moss, C.J.O., GARROW, J.A., and TEETZEL, J., concurred.

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HOPPER v. WILLISON.

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April 16.

Division Courts—Action on Foreign Note—Made and Held out of Jurisdiction—Place of Residence of Garnishee—R.S.O. 1897, ch. 60, sec. 190.

An action on a promissory note within division court competency, and which at the time the action is commenced is within the Province, may be brought in the division court in which is situate the place of residence of the garnishee, under sec. 190 of the Division Courts Act, R.S.O. 1897, ch. 60, when the maker resides in another division in the same county, although the note may have been made and the holder may reside out of the Province.

THIS was a motion by way of appeal from the ruling of the Judge of the first division court in the county of Kent at the city of Chatham, dismissing this action on the ground of want of jurisdiction, and for a new trial, and was argued on April 15th, 1908, before BOYD, C., FALCONBRIDGE, C.J.K.B., and TEETZEL, J.

The plaintiff, and primary creditor, sued as *bonâ-fide* holder of a promissory note made by the defendant and primary debtor, E. Willison, for \$125, and sought to attach moneys due to Willison from the Vulcanic Oil and Gas Company, of Chatham, Ontario, the garnishees. The note was dated Haskino, Ohio, September 22, 1905, and was payable six months after date. The remaining material facts are stated in the judgment.

H. L. Drayton, K.C., for the motion, referred to secs. 71, 72, 84 and 190 of the Division Court Act, R.S.O. 1897, ch. 60, and to *McCabe v. Middleton* (1906), 27 O.R. 170; *Lented v. Congdon* (1901), 1 O.L.R. 1.

No one *contra*.

April 16. The judgment of the Court was delivered by BOYD, C.:—The cause of action arose out of the jurisdiction in the United States, and is in the shape of a promissory note made by the defendant, primary debtor for \$125. This note has now been brought into this Province, and is sued upon by the holder (who is now in fact still resident in Ohio, where the note was made).

The defendant is now carrying on business at Fletcher in the county of Kent in Ontario, and may be sued in the division court holden at that place as his place of residence to recover this note:

secs. 83 and 84 of Division Courts Act, R.S.O. 1897, ch. 60. Under sec. 86 an order may be made for the action to be entered and tried in an adjacent division court of the same county. What the Judge may do the statute also permits under sec. 190. Under sec. 190, where judgment has not been recovered by the primary creditor he may sue process out of the division court in the division where the garnishee lives or carries on business (in this case the city of Chatham in Kent). In *McCabe v. Middleton*, 27 O.R. 170, it is held that the garnishee proceedings under sec. 190 may be in the division of the garnishee's residence, though the cause of action does not arise there or the primary debtor be resident therein. This is worked out in *Lented v. Congdon*, 1 O.L.R. 1, 5, shewing that though the primary debtor resides in another division and disputes the jurisdiction, that still judgment may be given against the primary debtor though the action be dismissed as against the garnishee. In *Wilson v. Postle* (1901), 2 O.L.R. 203, it was held that jurisdiction did not obtain under sec. 190 when the garnishee resides without the Province; but where all parties are within the jurisdiction of the division court of the county, the proceedings may well originate in the division court nearest the residence of the garnishee.

I do not follow the Judge's ruling that he had no jurisdiction in this case because the note in question was made out of the jurisdiction: it is now sued on and is within the jurisdiction and the person liable thereon is also within the jurisdiction of the Court over which he presides and the note is of division court competency.

No cause was shewn against the motion for a new trial, and the Judge has not furnished any reasons for his ruling. The case should be sent back for trial, and costs of appeal should be fixed at \$15, to be paid by defendant to primary creditor. No costs of appeal to garnishee.

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March 23.

REX v. IRWIN.

REX v. PETTIT.

Intoxicating Liquors—Sale of Liquor near Public Works—Liquor License Act—Police Magistrate—Justices of the Peace—Jurisdiction—Conviction—Form of—Irregularity—Costs—R.S.O. 1897, ch. 245, sec. 49—Ibid. ch. 39.

In areas wherein R.S.O. 1897, ch. 39, an Act respecting the sale of intoxicating liquors near public works, is in force, a person who sells liquor without license may be proceeded against either under that Act or under the general Liquor License Act, R.S.O. 1897, ch. 245. It is optional to proceed under either one Act or the other, with this proviso, that the offender shall not be punished twice for the same illegal sale.

The fact that a man is a police magistrate does not debar him from calling in another justice of the peace to sit with him, and there is nothing to oust the general jurisdiction of justices in the fact that a stipendiary magistrate has been appointed for the district.

The omission to ascertain the costs and insert the amount in a conviction under the Liquor License Act, R.S.O. 1897, ch. 245, sec. 49, is only a irregularity and not a fatal defect, and may be afterwards rectified by the same justices if it is sought to enforce payment of the costs.

Semble, that under the proper construction of sec. 49 of the Liquor License Act, it is not necessary to negative the excepted cases in a conviction under that section.

Semble, that reducing the evidence of witnesses to writing and tendering the same to them to be signed by them, though details which it is better not to disregard, are not essential to the validity of a conviction under the Liquor License Act.

THESE were motions for writs of *certiorari* to quash the conviction by R. H. C. Browne and Hugh Williams, two of His Majesty's Justices of the Peace in and for the District of Nipissing, of each defendant for that he did, on September 14th, 1907, at the township of Englehart, in the district of Nipissing, unlawfully sell liquor, without the license therefor by law required, upon the following, among other grounds:—

(1) That the statute under which the conviction purported to be made, namely, R.S.O. 1897, ch. 245, sec. 72, the Liquor License Act, was not in force in the place aforesaid, or as to the premises in which the offence was alleged to have been or was presumably committed at the time of the alleged commission thereof.

(2) That R.S.O. 1897, ch. 39, being an Act respecting the sale of intoxicating liquors near public works, was the only statute then in force in respect of such place or premises.

(3) That there was no evidence to prove an offence under the Liquor License Act.

(4) That there was no evidence of the locality of the commission of the offence, and no locality, therefore, within the magistrate's jurisdiction made to appear in the conviction.

(5) That the convicting magistrates jointly, or the associate magistrate, had no authority to convict the defendant.

(6) That such convicting magistrates should have been appointed by individual commissions.

(7) That the information, evidence and conviction should have negated a sale under legal process, or for distress, or by an assignee in insolvency.

The motion was argued on March 18th, 1908, before BOYD, C., MAGEE and MABEE, JJ.

J. B. McKenzie, for the motion, contended that the Act R.S.O. 1897, ch. 39, being an Act respecting the sale of intoxicating liquors near public works, is the only Act now in force governing the matters in question, and referred to *Regina v. Prittie* (1878), 42 U.C.R. 612, at pp. 621-3; *Michell v. Brown* (1858), 1 E. & E. 267, at pp. 274-5; *Graham v. McArthur* (1866), 25 U.C.R. 478, 483. He also contended that it was permissible to go behind the return and shew want of jurisdiction by affidavit, and that there was no jurisdiction to convict here.

J. R. Cartwright, K.C., for the Crown, referred, as to jurisdiction, to *Rex v. Leconte* (1906), 11 Can. Crim. Cas. 41, also *The King v. James*, [1902] 1 K.B. 540.

March 23. The judgment of the Court was delivered by BOYD, C.:—The original of the Act R.S.O. 1897, ch. 39, which is the Act of Canada of 1856, 16 Vict. ch. 164, makes it perfectly plain that liquor licenses may exist in places where the Act is in force, and that such licenses may be renewed, and that liquor may be sold under such licenses notwithstanding the general prohibition of the Act. The same saving clause as to sale by wholesale in such territory appeared in the original Act, which is now reproduced in sec. 1, sub-sec. 4, of the present statute. That sub-section also contains the saving from the operation of the Act of renewal licenses of houses or shops (meaning houses of public entertainment) usually licensed before the construction of the public work was commenced. It follows, I think, that one who sells liquor without license in this

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area is liable to be punished in two ways, either under the special Act or under the general Liquor License Act, R.S.O. 1897, ch. 245, for so selling illegally. It is optional to proceed under one Act or the other, as in the case of cumulative offences, with this proviso, that the offender shall not be punished twice for the same illegal sale: R.S.O. 1897, ch. 1, sec. 11. Thus the first and second objections are disposed of.

The evidence returned shews a sale of whiskey in bottles by the defendant Irwin to the witness at Englehart on September 13th, 1907. The evidence was reduced to writing, and may have been read over to the witness for all that appears—who may have refused to sign it for all that appears. I do not say, that if it had affirmatively appeared that it was not read over and that the witnesses were not asked to sign, that it would make any difference. These details are not essential to the conviction, though it is better not to disregard them. The materials shew that Englehart is a town and a railway station on the Temiskaming and Northern Ontario Railway; we may also take judicial notice that it is a Dominion post-office, and that it is marked in the maps published in the Atlas of Canada issued by the Department of the Interior in 1906. It is a tangible, well-known locality in the judicial district of Nipissing, and within the jurisdiction of the magistrates. This disposes of objections numbered 3, 4 and 5, of which, indeed, only No. 5 was adverted to in the argument.

This prosecution may be tried before two justices for the district, under sec. 97 of the Liquor License Act, ch. 245. If Mr. Brown is a police magistrate for Cobalt, he is also *ex officio* justice of the peace, and he can call in another justice of the peace to sit with him. I see nothing to oust the general jurisdiction of justices, though a stipendiary magistrate be appointed for the district: R.S.O. 1897, ch. 87, secs. 27, 30; ch. 109, sec. 37.*

* R.S.O. 1897, ch. 87, sec. 27: "Every police magistrate shall, *ex officio*, be a justice of the peace for the whole county or union of counties or district for which, or for part of which, he has been appointed."

Section 30: "A police magistrate sitting as such shall have full power to do alone whatever is authorized, by any statute in force in this Province relating to matters within the legislative authority of the Legislature of the Province, to be done by two or more justices of the peace; and every police magistrate shall have such power while acting anywhere within the county for which he is, *ex officio*, a justice of the peace."

R.S.O. 1897, ch. 109, sec. 37, provides for the appointment of stipendiary magistrates for the Judicial District of Nipissing.

Objections six and seven are overruled.

Objection nine* is answered by the fact that the conviction follows the form given in the statute applicable to sec. 49 for selling without license. The form sched. F., No. 3 of R.S.O. 1897, ch. 245, p. 3024, does not negative any exceptions, and it is declared by section 103 to be sufficient. The evidence shews that the sale was not legalized by any of the exceptions.

The defendant pleaded not guilty and declared she was ready for trial, and the various objections from nine to twelve seem to have been copied from stereotyped forms and were not adverted to on the argument. The rule *nisi* should not have given such latitude in raising imaginary difficulties.

The last objection in this case† is that no sum is named for costs in the conviction. The conviction follows the usual form, and has a blank space where the amount of the costs should appear. (See sec. 72 of Liquor License Act).

The omission to ascertain the costs and insert the amount in the conviction is only an irregularity, not a fatal defect, and it is a matter that may be afterwards rectified by the same justices—if it is sought to enforce payment of the costs. As the matter stands here it forms no valid objection to the conviction—as it might be treated as a failure to award costs. This appears to be the result of the authorities: *Sellwood v. Mount* (1841), 1 Q.B. 726, 735; *Bott v. Ackroyd* (1859), 28 L.J.M.C. 207; *Queen v. Clark* (1844), 5 Q.B. 886; *Queen v. Pringle* (1842), 6 J.P. 249. This last case also goes to shew that in the construction of sec. 49 it is not needful to negative the excepted cases—as the proviso is not in the same sentence, but is so placed as to operate as a distinct enactment. A position also illustrated by the case cited by Mr. Cartwright, *King v. James*, [1902] 1 K.B. 540, in which *Re Pringle* is not cited.

We are told that penalty and costs have been paid by the defendant; all that can be done now is to have the costs taxed

* 9. The information should appear to have been laid after offence committed.

† The last objection, viz., 15 was: Neither the minute of conviction nor the conviction itself names any sum for costs.

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(if that is asked) and a refund made if any excess has been charged.

The application is dismissed with costs.

REX v. PETTIT.

This is a conviction by the same magistrates of the defendant for a like offence committed in the town of Englehart. The main difference is that as against thirteen objections raised in the Irwin case, there are fifteen raised in this case; thirteen being the same in each case and the two extra ones in this being (9) the information should appear to have been laid after the offence was committed, and (10) no information was laid at all charging the defendant with the offence stated in the conviction, but only one charging him with an offence at Cobalt.

What has been said as to the thirteen objections in the Irwin case will apply to the thirteen objections which are common to this case. None of them should prevail. The defendant appeared, pleaded not guilty, stated he was ready for trial, and gave evidence on his own behalf; but was convicted on the clear evidence of two witnesses.

The information was laid on the same day as the offence was committed, September 14th, and the trial and conviction was on the 16th of the same month.

The original information returned shews an offence at Englehart and not at Cobalt. The copy furnished to Hicks appears to be in error as putting it at Cobalt. The information, though sworn on the same day, affirms that the offence had taken place, *i.e.*, at an earlier hour on September 14th, and is sufficient as to time. The affidavits filed for the defendant are amply met and negatived by the affidavits filed for the Crown, and there is an entire absence of any evidence to shew that the defendant was unfairly treated or deprived of his full right of defence—of which he indeed availed himself.

This application shares the fate of the other, and is dismissed with costs.

A. H. F. L.

[DIVISIONAL COURT.]

SIMPSON v. DOLAN.

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1908

March 10.

Banks and Banking—Cheque Countersigned by Representative of Bank—Authority of Representative—Promise not made in Writing—Statute of Frauds (29 Car. II. ch. 3), sec. 4—Original Liability—Bank Act, R.S.C. 1906, ch. 29, sec. 76.

A firm of dealers in fruit, whose account was overdrawn at their bank, applied for further advances, which the bank refused to make unless one D. was employed to look after the business, act as bookkeeper, receive all produce, and countersign cheques given for the same. D. was so employed, and represented to producers of fruit that it was safe for them to bring their produce to the factory, and that cheques given therefor countersigned by him would be paid by the bank. The plaintiff, relying on these representations, delivered peaches, for which he received the firm's cheque countersigned by D. The bank, which at the time had liens on the plant and property of the firm, through D. disposed of the whole output of the factory, including the plaintiff's goods, and received the entire profit. On the cheque being presented, the bank refused payment, upon which this action was brought:—

Held (MEREDITH, C.J., dissenting), (1) that the bank had such an interest in the goods delivered by the plaintiff as prevented the application of the 4th section of the Statute of Frauds, and were therefore bound by D.'s promise or representation that they would pay the cheque, though not made in writing.

The principle of *Sutton v. Grey*, [1894] 1 Q.B. 285, discussed and applied.

(2) That there was evidence to support the finding of the Court below, that there was an original liability on the part of the bank, on which the plaintiff was entitled to recover, on the authority of *Lakeman v. Mountstephen* (1874), 7 H.L. 17.

APPEAL by the defendants, the Sovereign Bank of Canada, from the judgment of the Judge of the county court of the county of Lincoln, in favour of the plaintiff, in an action tried before him without a jury on the 12th December, 1907. The facts are fully set out in the judgments.

The appeal was heard by a Divisional Court composed of MEREDITH, C.J. C.P., ANGLIN and CLUTE, JJ., on February 10th, 1908.

H. H. Collier, K.C., for the defendants, the Sovereign Bank, appellants.

A. C. Kingstone, for the plaintiff.

March 10. CLUTE, J.:—This is an appeal from the judgment of the Judge of the county court of the county of Lincoln in favour of the plaintiff, for \$249.92, against the defendants the Sovereign Bank of Canada, with costs, and in favour of the defendant Dolan without costs.

I understand the facts to be as follows:—

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Prior to 1906, Flynn Bros. manufactured canned fruits and vegetables at the city of St. Catharines. At the close of the year 1905, Flynn Bros. had an overdrawn account with the Sovereign Bank. At the opening of the season of 1906, when Flynn Bros. applied for advances for that season, the bank refused unless the defendant Dolan was employed to look after the business—to act as bookkeeper, to weigh, measure and receive products purchased from farmers and other producers, and to countersign all cheques given for such produce.

This arrangement was made, and Dolan acted throughout the season, and countersigned all cheques drawn by Flynn Bros. in payment of produce received. The cheques were in a similar form to the one given to the plaintiff when he delivered his produce at the factory—which is as follows:—

“St. Catharines, Ont., Dec. 13th, 1906.

The Sovereign Bank of Canada pay J. M. Simpson or order
Two Hundred and Forty Nine 49 1/100 Dollars \$249.92. Peaches.

(Sgnd.) Flynn Bros.” “J. B. Dolan” (signed across the cheque.)

The business was conducted in this manner for the season of 1906. His Honour the county court Judge finds “that Dolan represented to the farmers and producers that it was safe for them to bring their produce to the factory; that he would receive it and give them cheques on the Sovereign Bank, which would be cashed.” This was apparently necessary to induce producers to bring their produce to that factory, as they had considerable trouble the preceding year. Under this arrangement Dolan received produce and gave large numbers of cheques, all of which were paid by the Sovereign Bank, except two or three, of which the cheque sued on is one. When the cheque in question was presented the manager delayed payment, and finally refused to honour the same, alleging that Flynn Bros. had largely overdrawn, and that he thought the bank was entitled to all there was left. The bank at that time had liens on the whole plant, property and product of the firm. During the season Dolan managed all the business, purchased the products and made sales of the produce, doing all the business with the Sovereign Bank. The bank received the profits on all sales and paid all drafts. All cheques for produce were countersigned by Dolan; all the produce

received went into the general output, and among it were the plaintiff's goods. The bank through Dolan disposed of the entire output and got the proceeds. Flynn Bros. made an assignment for the benefit of creditors about the first of April, 1907. He further finds, that Dolan did not pledge his individual credit. The plaintiff says he sold his produce at the factory on condition that the Sovereign Bank was to pay for it. He says he saw Dolan at the factory, who said he represented the bank and that the bank would cash the cheques. His first cheque was cashed without delay. The cheque sued on was for peaches. He says Dolan made him an offer, and he accepted and looked to the Sovereign Bank from what he told him when he said he was there in the interests of the bank. He said, "take your cheque to the Sovereign Bank and you will get your pay."

After the manager refused payment Dolan said, "the cheque would have to be cashed and will be cashed." Flynn says that Dolan came there in the bank's interests and Crombie sent him. "We would not have had him if Crombie hadn't sent him. He came to look after the office and books, weigh and countersign cheques. The bank paid for the fruit and received the money from the sales. I didn't employ Dolan. Dolan was not our employee; he was sent there by the bank, and I understood that the bank would pay for all the goods that were bought while Dolan was there, and the cheques were indorsed by him. I understood that the bank would pay for all goods received if countersigned by Dolan. It was understood that the bank would pay cheques for goods received and countersigned by Dolan. The cheques were to be honoured when the produce was received. He said something that led me to believe that he would honour them. He said so—that was the agreement; he told me to sign cheques for produce." Crombie denies this. He says, "As I told Flynn the bank would not advance unless he employed Dolan," and he denies that he agreed to pay all cheques countersigned by Dolan. He admits he told Kidder that the bank owned all Flynn's plant and goods, because the bank had liens covering them. He says Dolan was there in the interests of both the Flynn's and the bank. He was to countersign cheques. "I wanted Dolan to certify matters for which the cheques had been given; all moneys realized from sales came to the bank. The bank paid all cheques for produce countersigned by Dolan excepting

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two or three." He further says: "The bank did not pay this cheque, because there was no funds to meet it. We had made advances from time to time. We had a right to the security ourselves. We had made advances and we had to secure ourselves."

His Honour finds it "quite certain that Dolan had authority to give parties having produce to understand that if he countersigned cheques therefor the bank would pay them at once. That as a matter of fact he did so represent and the bank did pay all but this cheque and possibly one more. To that extent Dolan was the agent of the bank, and I so find and hold."

I think the evidence fully supports the finding of the learned county court Judge. The question here is whether upon that finding of facts the plaintiff can recover.

It is strongly urged on behalf of the bank that the 4th section of the Statute of Frauds applies, and that there is no liability.

In *Batson v. King* (1859), 4 H. & N. 739, one Dalton wanting money, he and the defendant applied to the plaintiff to draw a bill to be accepted by Dalton and indorsed by the defendant, and the defendant promised the plaintiff that he should not be called upon. The jury found that Dalton and the defendant were both principals in the transaction. *Held*, that the plaintiff, having paid the bill, was entitled to recover the amount without proof of a promise in writing under the 4th section of the Statute of Frauds. During the argument, Pollock, C.B., says: "If a man says to another, 'if you will at my request put your name to a bill of exchange I will save you harmless,' that is not within the statute. It is not responsibility for the debt of another. It amounts to a contract by one, that if the other will put himself in a certain situation the first will indemnify him against the consequences." Martin, B., points out that, "As between the holder of a bill of exchange and the parties whose names were on it, Dalton as acceptor was primarily liable, and the drawer and indorser stood in the relation of sureties for him. But as between the parties it may always be proved what is the real nature of the transaction. As between themselves, Dalton and the defendant were the real principals. The plaintiff having paid the bill, had the right to sue the defendant for money paid to his use. The Statute of Frauds has no application to the case. It might have been otherwise if Dalton had been entirely separate from the defendant and the plaintiff had become responsible for

Dalton upon the defendant's promise to indemnify him. Dalton and the defendant being both principals, the only answer which the defendant had was by a plea in abatement for the non-joinder of Dalton." See De Colyar on Guarantees, 2nd ed., 66.

In Encyc. of the Laws of England, 2nd ed., vol. 6, p. 267, it is said: "There must be a clear expectation on the part of the promisor that the person primarily liable will pay, and that his own liability will only arise on default of such payment," citing *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285; *Guild & Co. v. Conrad*, [1894] 2 Q.B. 885; *Harburg India Rubber Co. v. Martin*, [1902] 1 K.B. 778.

In *Sutton v. Grey*, the plaintiffs, who were stockbrokers, entered into a parol agreement with the defendant that he should introduce clients to them, and that the plaintiffs should transact business on the stock exchange for the clients thus introduced, upon the terms that, as between the plaintiffs and the defendant, the defendant should receive half the commission earned by the plaintiffs in respect of any transactions by them for any clients introduced by the defendant, and that he should pay to the plaintiffs half of any loss which might be incurred by them in respect of such transactions. The plaintiffs claimed to recover from the defendant half the loss which they had incurred in stock transactions which they had entered into on behalf of one Robertson, who had been introduced to them by the defendant. It was held that the contract was not within sec. 4 of the Statute of Frauds, and the action maintainable, though the contract was not in writing. Esher, M.R., said (p. 286): "I do not think that the relation between the plaintiffs and the defendant was that of partnership. They had no intention to become partners, and, as the law now stands, a partnership cannot be constituted without such an intention." He finds the true relation between the plaintiffs and the defendant was this: "If you will find persons who wish to operate upon the stock exchange and will introduce them to us as clients, we will, on behalf of the persons whom you thus introduce to us, transact the ordinary business of a broker on the stock exchange, and make ourselves personally responsible according to its rules on these terms: that our broker's commission on the stock exchange shall be divided between us and you, just as if you were our partner and a member of the stock exchange, and that, if there should be a loss in respect of the transactions, you shall indemnify us against half the loss." He proceeds:

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"The contract, in my opinion, is one which regulated the part which the defendant was to take in the transactions which were contemplated, and, if he was to be an agent for the plaintiffs, the contract regulated the terms of his agency. Again, before the transactions were entered into, the terms were regulated by the agreement, and they were such as to give the defendant an interest in the transactions. The transactions were to be entered into by the plaintiffs partly for their own benefit, and partly for the benefit of the defendant." After referring to *Couturier v. Hastie* (1852), 8 Exch. 40, he proceeds: "There the test given is, whether the defendant is interested in the transaction, either by being the person who is to negotiate it or in some other way, or whether he is totally unconnected with it. If he is totally unconnected with it, except by means of his promise to pay the loss, the contract is a guarantee; if he is not totally unconnected with the transaction, but is to derive some benefit from it, the contract is one of indemnity, not a guarantee, and sec. 4 does not apply." And at p. 289 he adopts the statement of the result of the authorities given by Cockburn, C.J., in *Fitzgerald v. Dressler* (1859), 7 C.B. (N.S.) 374, at p. 392: "If there be something more than a mere undertaking to pay the debt of another, as, where the property in consideration of the giving up of which the party enters into the undertaking is in point of fact his own, or is property in which he has some interest, the case is not within the provision of the statute, which was intended to apply to the case of an undertaking to answer for the debt, default, or miscarriage of another, where the person making the promise has himself no interest in the property which is the subject of the undertaking. I therefore agree with my learned brothers that this case is not within the Statute of Frauds." Esher, M.R., makes the following comment: "The learned Judge there used the words 'has himself no interest in the property which is the subject of the undertaking,' because he was dealing with a case of property; but if his words be read as I think they should be, 'has no interest in the transaction,' he is adopting the interpretation of *Couturier v. Hastie*, which I think is the right one."

Lopes, L.J., in the same case, at p. 290, says: "The true test, as derived from the cases, is, as the Master of the Rolls has already said, to see whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally

unconnected with the transaction, or whether he has an interest in it independently of the promise."

In the former case the agreement is within the statute. In the latter it is not. Kay, L.J., said (p. 291): "When a man simply agrees to assume liability for the debt of another, he has no interest whatever in the transaction, except by virtue of the guarantee. In the present case the defendant had an independent interest in the transactions. Another distinction is this, that the contract is one which regulated the terms upon which the defendant was to be employed by the plaintiffs. I agree with Bowen, L.J., that 'this is really a contract which regulates the terms of the agency, and the defendant's liability to answer for the debt of another is only an ulterior consequence of the terms in which the contract is framed.'"

In *Guild v. Conrad*, the defendant orally promised the plaintiff if he, the plaintiff, would accept certain bills for the firm in which his son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills. *Held*, that this was a promise of indemnity and not of guarantee, and therefore not required by sec. 4 of the Statute of Frauds to be in writing. The trial Judge, at p. 892, says: "The defendant's promise was not a contract to pay if the foreign firm did not pay, because there was no expectation at that time that the foreign firm would be able to pay. The contract was to find funds to enable the plaintiff to meet these acceptances." Lindley, L.J., after referring to the findings of the trial Judge, says: "The nature of the promise is all important; because, if it was a promise to pay, if the Demerara firm did not pay, then it is void under the Statute of Frauds as not being in writing. But if, on the other hand, it was a promise to put the plaintiff in funds in any event, then it is not such a promise as is within the Statute of Frauds. I think that the learned Judge has taken the true view, though it is very near the line." Davey, L.J., at p. 896, says: "In my opinion, there is a plain distinction between a promise to pay the creditor if the principal debtor makes default in payment, and a promise to keep a person who has entered, or is about to enter, into a contract of liability, indemnified against that liability, independently of the question whether a third person makes default or not."

This case was referred to and distinguished in *Beattie v. Dinnick* (1896), 27 O.R. 285.

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In *Harburg India Rubber Co. v. Martin*, [1902] 1 K.B. 778, reference is made to Lord Esher's judgment in *Sutton v. Grey* by Stirling, L.J., at p. 791. He says the word "interest" means some species of interest which the law recognized, and adds: "It has been contended that we ought to read the words 'interest in the transaction' in a wide sense, and as importing a 'business interest' in the syndicate—that kind of interest which a creditor and a shareholder of a company has in its prospects. To do this would, I think, go a long way to repeal sec. 4 of the Statute of Frauds, and to extend the doctrine of *Couturier v. Hastie*, 8 Exch. 40, very much further than I am prepared to extend it."

The question is, then, whether in the present case the bank had such an interest as would bring a promise made by the bank to pay the cheques countersigned by Dolan, within the true meaning of Lord Esher's judgment, as having an interest in the transaction. No doubt the case is very close to the line. To ascertain the meaning of the arrangement the whole transaction has to be looked at. The bank had a large overdrawn account of the previous year, which they hoped to reduce, and which was in fact reduced, by the business carried on under this arrangement in 1906. It was undoubtedly the intention of the bank—and the business was so carried on as to give effect to this intention—that any goods which were received by Dolan and for which he countersigned the cheque of Flynn Bros., the bank was to receive the benefit of. Their arrangement was such that they could control the business output, the sales and the receipt of money, and they did so control it under the management suggested by them, that they did in fact receive the proceeds of all the sales including the sale of the produce delivered by the plaintiff. They had, therefore, a direct money interest in the goods to be delivered; they induced those goods to be delivered by holding out a promise that they would pay for them upon the cheque being presented signed by Dolan, who must, I think, be considered their agent, as well as the agent of Flynn Bros. It was not intended that if Flynn Bros. made default in the payment of the bill they would pay it; but rather if the bill was presented countersigned by their agent, as evidencing delivery of the goods, they would pay it.

The bank was not a partner; the bank did not carry on this business. They did, however, enter into this arrangement by which

they had sufficient control of the business to receive the profits of the output and in that way recoup themselves for their advances, and receive the profits of the firm, whatever they might be, to apply on the overdrawn account. The bank had in my opinion such an interest as to bring this case within the principle applied in the above cases, and so exclude the 4th section of the statute.

I think the judgment below may be supported upon another ground, namely, that there was evidence from which a jury might find, as His Honour the county court Judge did find, an original liability on the part of the bank, that the plaintiff relied upon the bank paying him, and looked to the bank in the first instance for such payment. It is true that if the mere form of the cheque is to govern, it would follow that Flynn Bros. are the principal debtors, but, as was pointed out in *Batson v. King*, 4 H. & N. 739, "it may always be proved what is the real nature of the transaction."

The leading authority on this branch of the case is *Lakeman v. Mountstephen* (1874), L.R. 5 Q.B. 613; 7 Q.B. 196; 7 H.L. 17. A board of health had been formed in a town. L. was its chairman. M., a contractor, had, under the orders of the board, formed a main sewer in the town, and under the orders of the board had purchased pipes which would be required to be used in making the connecting drains between certain private houses and the main sewer. The board had given notice to the owners to make these connecting drains, the effect of the notice being that if they did not do so the board might make them and charge them with the expenses. The notice was disregarded. No subsequent resolution was passed by the board. M. was about to take away his carts and working material, when L. said to him, "What objection have you to making the connections?" to which M. answered, "None, if you and the board will order the work or become responsible for the payment," and L. replied, "M., go on and do the work and I will see you paid." M. did the work, and the board refusing to pay, sued L. for the amount. The jury found for the plaintiff for the amount claimed. On leave reserved the Queen's Bench Division entered a nonsuit, the Court holding that there was no evidence of primary liability which would justify the verdict for the plaintiff.

The nonsuit was set aside and judgment at the trial restored in appeal, and on a further appeal to the House of Lords this judgment was sustained. The case was there treated purely as one of

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fact. The Lord Chancellor (Lord Cairns) said: "The only question which your Lordships are called upon in this appeal to decide is, whether there was or was not evidence of an original liability on the part of the defendant to pay the plaintiff in the action for the work to be done." He quotes the language of the plaintiff, and points out that the plaintiff was willing to do the work if he got a formal order from the board to do it, or if he had a personal order from L. himself, and thereupon L. said in effect: "You go and do the work; don't concern yourself upon the subject of whether you have an order from the board or have not such an order. You go on and do the work and I will be your paymaster—I will see you paid."

Lord Selborne in his judgment refers to the case of *Cherry v. Colonial Bank of Australasia* (1869), L.R. 3 P.C. 24 which in some particulars resembles the present. There two directors of a joint stock company, by a letter to the company's bankers, notified them that their manager had authority to draw cheques on account of the company. Such two directors did not form a majority of the directors of the company, as required by their Act of incorporation, so as to bind the company, although the company's account was at the time overdrawn and that fact was known to the two directors. The bankers honoured the manager's cheques on the authority so given to them. In an action brought by the bank against the two directors for advances made on account of the company upon the faith of their letter, the Court below held that there was an implied warranty on their part and that they were personally liable to the bank. It may be observed that the recovery was not upon the letter but upon the implied warranty. The cases are numerous in which it has been held that a warranty does not fall within the statute. There are many cases where the question was one of primary liability and turned upon the finding "to whom credit was given." See *Edge v. Frost* (1824), 4 D. & R. 243; *Simpson v. Penton* (1834), 2 C. & M. 430; *Smith v. Rudhall* (1862), 3 F. & F. 143, where the plaintiff was held liable.

In other cases the Courts held upon the facts that the liability was only collateral, and that there was no evidence from which a primary liability ought to be inferred. See *Keate v. Temple* (1797), 1 B. & Pull. 158, where the jury found in favour of the plaintiff, but the verdict was set aside on the ground that the verdict was against

the weight of evidence; and see De Colyar on Guarantees, 2nd ed. (Blackstone ed.), pp. 83, 86, where the cases are reviewed.

After reading the evidence, I entertain no doubt that credit in this case was given to the bank; that the plaintiff did not intend from the first to look to Flynn Bros., whom he regarded as financially unsound; and would not have delivered his produce but for the promise of the bank made through Dolan. As was said by Willes, J., in *Mountstephen v. Lakeman*, L.R. 7 Q.B., at p. 203: "The facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming security for a liability, either past, present or future, upon the part of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, are, or shall be liable or not: 'Do that work now, and you shall be paid for that work.' So that is a case of principal liability."

So here the facts seem to exclude, and the jury might well find that they excluded, the notion that the bank became surety for the liability, either past, present, or future, upon the part of Flynn Bros., and they might look upon the defendants' contract as a contract to pay, whether Flynn Bros. had been, are, or shall be liable or not.

Deliver your goods, get a cheque signed by Dolan to shew that they were delivered, and you shall be paid for the goods which you delivered. That is a case in my opinion of principal liability.

The judgment below in my opinion is right and ought to be affirmed, and this appeal dismissed with costs.

ANGLIN, J.:—The facts of the case are fully stated in the judgment of my brother Clute. I agree in his view that the evidence warranted the findings of the learned county court Judge. Dolan, though nominally in the employment of Flynn Bros., was in reality the agent and representative of the bank in the management of Flynn Bros.' business. He represented to the plaintiff that if he delivered goods at Flynn Bros.' cannery, he, Dolan, would give him the cheque of Flynn Bros. drawn upon the bank and countersigned by himself, which, upon the strength of his countersignature, the bank would pay. This representation it was within the scope of his authority, as representative of the bank, to make. Upon

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the faith of this representation the plaintiff delivered his goods and took the cheque now sued upon in payment.

The bank had a direct interest in procuring delivery of the plaintiff's goods, inasmuch as they were in a position to obtain the entire returns from the output of Flynn Bros.' cannery. The plaintiff parted with his goods upon the distinct representation—not that the bank would guarantee payment for them by Flynn Bros., but that the bank itself would be the paymaster, whatever right of recourse it might have against Flynn Bros. The bank thereby assumed a position of principal and primary liability to the plaintiff.

I cannot read sec. 76 of the Bank Act, R.S.C. ch. 29, as precluding the bank from thus rendering itself liable. The bank was not the purchaser of the goods. Flynn Bros. were the purchasers, their interest consisting in the prospect of a reduction of their indebtedness by the application of the proceeds to their credit, which the bank was bound to make. Flynn Bros. had undertaken to buy only such goods as the bank by its agent authorized, and also to permit the bank, through their same agent, to receive all moneys earned by their business to be applied in reduction of their indebtedness. The plaintiff, however, had no expectation of payment by Flynn Bros. He made his contract to deliver to Flynn Bros. solely upon the direct promise of Dolan that the bank would pay the cheque which he received. To a case of such primary liability the 4th section of the Statute of Frauds has no application.

I think the appeal fails and should be dismissed with costs.

MEREDITH, C.J.C.P.:—This is an appeal by the defendants, the Sovereign Bank of Canada, from the judgment of the county court of the county of Lincoln in favour of the respondent, pronounced on the 16th December, 1907, after the trial before the Judge of that Court sitting without a jury on the 12th of that month.

The respondent's cause of action, as disclosed by his statement, is for goods sold and delivered by him to the defendant Dolan as agent for the appellants, who, it is alleged, was at the time in possession of the canning business carried on by Flynn Bros. at St. Catharines on behalf of the appellants, and the statement of claim also contains allegations that Dolan, in payment for the goods and as agent for the appellants, gave to the respondent a cheque

on the appellants' bank for the payment of the price of the goods, which was countersigned and delivered to the respondent by Dolan on behalf of the appellants, and that the respondent, relying on the credit of the appellants, and knowing that they had put Dolan in charge of the factory of Flynn Bros. as the appellants' representative, delivered the goods to Dolan and accepted the cheque so countersigned.

It is manifest that the respondent cannot recover from the appellants for goods sold and delivered to them or to Dolan as their agent, as such a transaction would be in direct violation of the provisions of the Bank Act, and the only way in which, if at all, the respondent can succeed, is by establishing that Dolan was authorized by the appellants to pledge their credit for the price of the goods, and that he in fact did so, and that the credit was given to the appellants and not to Flynn Bros.

Flynn Bros. were customers of the appellants, and almost the whole of their assets were pledged to the appellants as security for their account. Flynn Bros. were on the verge of insolvency, and their remaining in business depended upon their being able to obtain from the appellants sufficient advances to enable them to purchase the fruit and supplies necessary to carry on the business. Flynn Bros. applied to the appellants for advances for the business of the season of 1906, and the appellants were willing to make the advances, but stipulated that as a condition of their doing so, Dolan, whom they knew and had confidence in, should be employed by Flynn Bros. as bookkeeper, and that all cheques drawn on them by Flynn Bros. should be countersigned by Dolan. Flynn Bros. assented to this, and Dolan entered their service as bookkeeper and continued in their employment until some time after the transaction which has led to this litigation. Dolan, as had been arranged, countersigned the cheques drawn on the appellants' bank by Flynn Bros., and all these cheques, except the one given to the respondent and two or three others, were paid upon their presentation at the bank, but the respondent's cheque was not paid when presented, the appellants refusing to honour it because there were no funds at the credit of Flynn Bros.' account.

As to what I have stated there is practically no controversy, but the dispute on the facts is as to the position which Dolan occupied and his authority to pledge the appellants' credit for goods

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supplied for the purposes of the business of Flynn Bros. According to the testimony of Crombie, the manager of the appellants' bank at St. Catharines, his reason for insisting on the employment of Dolan was that he was not satisfied that if Flynn Bros. had not such a check upon them as the requirement that their cheques should be countersigned by Dolan imposed, he could not depend upon their cheques being drawn for the legitimate purposes of their business, and that he (Crombie) was desirous that Flynn Bros. should have the assistance in their business, and especially in the bookkeeping and banking part of it, of an experienced man such as Dolan was; that no authority was given to Dolan to pledge the credit of the appellants for anything, and that his countersigning the cheques meant no more than a statement by him that cheques so countersigned were drawn for the legitimate purposes of the business of Flynn Bros.

Crombie's testimony is clear and explicit as to all this, and against it there is nothing but the testimony of Dolan, the result of which when fairly read is that nothing was said by Crombie as to Dolan being authorized to pledge the credit of the appellants or to assure the sellers of goods that the cheques which they received would be paid by the appellants or that the appellants would pay for the goods, but that he inferred from the nature of the transaction and the course he was to adopt that he had that authority.

With great respect, I am unable to agree with the conclusion of the learned Judge of the county court in which my learned brethren in this Court agree, that Dolan was authorized by the appellants to pledge their credit for the payment of the price of goods supplied to Flynn Bros. and for which their cheque countersigned by Dolan should be given. My conclusion is that Dolan's countersigning the cheques was, as the appellants contend, in effect a certificate by him that the cheques had been drawn in the course of business of Flynn Bros. and for the legitimate purposes of the business, and that he had no authority express or implied to pledge the credit of the appellants for anything.

I am of opinion also that even if Dolan had had the authority of the appellants to pledge their credit, there was no evidence that he did pledge it for the payment of the price of the goods for which the respondent is suing. The respondent had three transactions with Flynn Bros. in 1906, the first, a sale of fruit on the

6th July, in payment for which he received Flynn Bros.' cheque for \$25, which was not countersigned by Dolan, who was not then in the employment of Flynn Bros.; another sale on the 23rd August, for which he received Flynn Bros.' cheque for \$202.98, countersigned by Dolan, which was paid; and a third, the sale in question, which was of fruit for which he received Flynn Bros.' cheque, dated 13th December, 1906, countersigned by Dolan.

According to the respondent's testimony, he had dealt with Flynn Bros. in 1904 and had had trouble in getting prompt payment, and in the latter part of July or the first week of August, 1906, he saw Dolan at their factory and asked him if he (the respondent) was perfectly safe in taking his produce there, as he was doubtful about Flynn Bros., and that Dolan replied that he was there in the interests of the Sovereign Bank and the respondent was perfectly safe in taking his goods there, that he (Dolan) would give him a cheque on the Sovereign Bank, and that he could take it there and get it cashed, and that the second and third sales were made relying on these representations of Dolan, though nothing was said on the occasions when the sales were made.

Coupling with this the fact that the cheques were the cheques of Flynn Bros., and what is, I think, a fair inference from the respondent's testimony, that he knew that the business was being carried on by Flynn Bros., I cannot see that what was said by Dolan amounted to a promise by Dolan justifying a finding that the respondent gave credit to the appellants. The proper conclusion is, I think, that credit was given to Flynn Bros. upon the collateral promise by Dolan that the appellants would pay Flynn Bros.' cheque upon its presentation, and upon such a promise the respondent cannot recover, the promise not being in writing.

The case at bar differs widely from *Lakeman v. Mountstephen* L.R. 7 H.L. 17, referred to by my brother Clute; in that case the plaintiff refused to go on with the work without a contract from the local board, but offered to do so if the defendant or the local board would give him an order for the work, to which the defendant replied, "You go on and do the work and I will see you paid," or as paraphrased by the Lord Chancellor, p. 23, "You go on and do the work and I will be your paymaster. I will see you paid," and it was held that this afforded evidence for the jury that "the go-by was entirely given to the question of an order of the local board,

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and Mr. Lakeman (the defendant) stepped in and undertook himself as a matter of primary liability to pay for the work that would be done."

It will be observed that there was no other person primarily liable, or who it was contemplated would become primarily liable; that the local board had made no contract with the plaintiff, and that the work was done by him in pursuance of the direction of the defendant, and on his promise to be the paymaster of the plaintiff.

Lord Selborne deals with this aspect of the case (p. 25), and after pointing out that there can be no suretyship unless there is to be a principal debtor, goes on to say: "The tendency, therefore, of any view of this contract which would place it in the position of a guarantee for a future liability to be undertaken by the local board, would be absolutely to defeat the whole purpose of the communication, which was to remove a difficulty then pressing upon the mind of the contractor, as to whether or not he had sufficient authority from any one to go on with the work; and the answer was given in terms *de presenti* for the express purpose of inducing him at once to go on."

I refer also to the case when before the Exchequer Chamber, (1871), 7 Q.B. 196, and to the note to Mr. Evans' edition of Salkeld's Reports, referred to by Willes, J., at p. 202: "From all the authorities it appears, conformably to the doctrine in this case, that if the person for whose use the goods are furnished is liable at all, any other person's promise is void except in writing."

In the case at bar there was a principal debtor, Flynn Bros., for whose use the goods were to be furnished, and they were liable to the respondent. The purpose of the arrangement with Dolan was not to obtain a contract from him for the purchase of the fruit, but to secure the respondent that he would be paid for the fruit which he contemplated selling to Flynn Bros., and Dolan's promise was therefore in my opinion, as I have said, a collateral promise to answer for the debt of another.

In my opinion the respondent's case failed and his action should have been dismissed. I would therefore allow the appeal without costs, reverse the judgment pronounced in the court below, and direct that judgment be entered dismissing the action without costs.

G. G.

[IN CHAMBERS.]

REX EX REL. MILLIGAN V. HARRISON ET AL.

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March 21.

Municipal Corporations—Controllers—Qualification for Office—Declaration of Qualification—Commissioner for Taking Oaths and Affidavits—Consolidated Municipal Act and Amendments—Canada Evidence Act.

The statutory declaration as to the possession of the necessary qualification for office required by sec. 129, sub-sec. 3 (a), of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), as amended by 4 Edw. VII. ch. 22, sec. 4 (O.), from every candidate for the office of mayor, reeve, etc., in cities, etc., may be made before a commissioner for taking affidavits, and need not be expressed in the form of a statutory declaration under the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 36. Section 315 of the first mentioned Act, which requires the head and other members of the council and the subordinate officers of every municipality to make their declaration of office and qualification "before some Court, Judge, police magistrate, or other justice of the peace, having jurisdiction in the municipality," has no application to sec. 129, sub-sec. 3 (a), and the statutory declaration therein referred to.

Semble, that sec. 93 of the Consolidated Municipal Act, 1903, to the effect that when joint owners or occupants are rated at an amount sufficient, if equally divided between them, to give a qualification to each, then each shall be deemed rated within the Act, otherwise none of them shall be deemed so rated, does not apply to the qualification of candidates.

Where persons elected as controllers of a municipality, when purporting to make the declaration required by sec. 311 of the Consolidated Municipal Act, 1903, as to their property qualification, omitted the statement as to encumbrances contained in the form embodied in the section, and in place of it stated that they were "in the actual occupation of the said premises," intending to take advantage of the provisions of sec. 76, sub-sec. 1, by which the value of the property, if occupied, if otherwise sufficient, shall not be affected or reduced by the incumbrances:—

Held, that this was a sufficient compliance with the provisions of the Act, and the declarants were not to be prejudiced by the fact that the Legislature had failed to alter the form of declaration in sec. 311, suitably for such a case.

Held, also, that the fact that in the declaration in referring to their qualification, the declarants had used the present tense instead of referring to the time of the election, was not a fatal objection, and an opportunity should be given to them to file a declaration in the proper form.

This was an appeal by the relator from an order of the Master in Chambers, dated March 4th, 1907, dismissing the relator's motion to unseat the respondents, who were, at the last municipal election for the city of Toronto, declared to be elected as controllers for that city. The appeal was argued before MEREDITH, C.J.C.P., in Chambers, on March 10th, 1908.

W. N. Ferguson, K.C., for the appellant.

W. E. Middleton, K.C., for the respondents.

The arguments of counsel are sufficiently referred to in the judgment.

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March 21. MEREDITH, C.J.:—The election of the respondents is attacked on the ground that, after their nomination, they failed to comply with the requirement of sub-sec. 3a of sec. 129 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), as amended by 4 Edw. VII. ch. 22, s. 4 (O.), as to filing the statutory declaration mentioned in the sub-section, and, therefore ceased to be candidates and were not eligible for election.

Sub-section 3a provides as follows:—

“(3a) In cities, towns and incorporated villages every candidate for the office of mayor, reeve, deputy reeve, controller, alderman, councillor, water commissioner and street railway commissioner shall, on the day of the nomination, or at any time before nine o'clock in the afternoon on the following day, or, when such last-named day is a holiday, then before twelve o'clock noon of the succeeding day, file in the office of the clerk of the municipality a statutory declaration in accordance with the form contained in sec. 311 of this Act, or to the like effect, that he possesses the necessary qualification for the office, and, in default of his so doing, such candidate shall be deemed to have resigned, and his name shall be removed from the list of candidates, and shall not be printed on the ballot papers.”

Each of the respondents made a declaration substantially in the prescribed form before a commissioner for taking affidavits, and filed it in the clerk's office within the time prescribed by the sub-section.

It is contended that these declarations are not such as the sub-section requires; that what is prescribed is a statutory declaration under the provisions of sec. 36, R.S.C. 1906, ch. 145; that a commissioner for taking affidavits is not a functionary before whom the declaration properly could be made; and that there was, therefore, a failure to comply with the requirement of the sub-section, with the result that the respondents were to be deemed to have resigned, and that their names should not have been printed on the ballot papers.

Rex ex rel. Cavers v. Kelly (1906), 7 O.W.R. 600, a decision of my own, was cited as authority for the proposition that what is prescribed is a statutory declaration under sec. 36, ch. 145, of the Revised Statutes of Canada, and the learned Master appears to have so treated it.

The point in that case, and the only one decided, was that it was not necessary that the declaration should be made before a Court or a Judge or justice of the peace, as provided by sec. 315, but that it might be made before a commissioner for taking affidavits.

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I expressed the opinion in that case that the statutory declaration mentioned in sub-sec. 3a was a statutory declaration made in accordance with the provisions of the Dominion Act, to which I have referred, but the decision did not depend upon that view, and, as had been pointed out by the Master in Chambers, in his judgment reported in 7 O.W.R. 280, a commissioner for taking affidavits has power, under sec. 13 of R.S.O. 1897, ch. 74, to take the declaration.

I do not now see why the words "statutory declaration" should be confined to a declaration made under the authority of the Dominion Act or why they may not be treated as an inartistic mode of describing the declaration for which the subsection provides, for it is a statutory declaration in the sense that it is required by the sub-section to be made.

I adhere to the view expressed in *Rex ex rel. Cavers v. Kelly*, that sec. 315 does not apply to the declaration provided for by sub-sec. 3a of sec. 129.

Section 315 provides for the making of the declarations of office and qualification before a Court, Judge or justice of the peace.

Section 311 provides that "Every person elected or appointed under this Act to any office requiring a qualification of property in the incumbent shall, before he takes the declaration of office or enters upon his duties, make and subscribe a solemn declaration to the effect" mentioned in the section, and sec. 312 provides for the making of the declaration of office.

Section 316 enables certain officers to administer any oath, affirmation or declaration under the Act, except where otherwise expressly provided, and except where the officer is the person required to make it.

Section 317 provides that the person administering the oath, affirmation or declaration shall certify and preserve it, and within eight days deposit it in the office of the clerk, while the declaration

Meredith, C.J. provided for by sub-sec. 3a of sec. 129 is to be filed by the candidate.
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REX EX REL. Having regard to all these provisions, I am of opinion that
 MILLIGAN sec. 315 does not apply to the declaration provided for by sub-
 v. sec. 3a, and if that be the case, the declarations in question were
 HARRISON. properly made before a commissioner for taking affidavits, for
 sec. 13 of ch. 74, R.S.O. 1897, provides as follows: "13. Commissioners for taking affidavits in any county or district in this Province shall be deemed to have power within such county or district to take statutory declarations in all cases in which statutory declarations may be taken or may be required under any Act from time to time in force in this Province."

The next objection relates only to the respondent Hocken, and is that he did not possess the necessary property qualification to entitle him to become a candidate or to be elected.

The wife of this respondent was down to December 10th, 1907, the owner of lot No. 563 Euclid avenue, which was assessed on the last revised assessment roll for \$3,660, and on that day she conveyed it to her husband, who continued to be the owner down to and at the time of his election.

Upon the assessment roll the name of the respondent Hocken appears in the column headed "Nature, etc., of taxable parties," and in a column (2a) headed "Name and address of owner or lessee," and a column (4a) headed "Owner O. Lessee L.," the following entries are made:

Column 2a.

Column 4a.

"Hocken, Isabel (M)

Hocken, Horatio C.

O."

Sub-section 11 of sec. 33 of the Assessment Act (4 Edw. VII. ch. 23 (O.)), provides that "where a married woman . . . is assessed as owner, the name of her husband shall also be entered in the roll as an owner," and that "where the property is assessed for a sum sufficient to entitle a sole owner, but insufficient to entitle two joint owners of the property to vote at municipal elections, the letter "O" shall be inserted in column 4 of the assessment roll after the name of the husband, who shall be entitled to be entered on the voters' list as the owner of the property."

By sec. 93 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), it is provided that "where real property is

owned or occupied jointly by two or more persons, and is rated at an amount sufficient, if equally divided between them, to give a qualification to each, then each shall be deemed rated within this Act, otherwise none of them shall be deemed so rated."

This section was relied on by counsel for the appellant as shewing that the respondent Hocken and his wife must be deemed to be jointly rated, and that the amount of the rating must be equally divided between them, and if that were the case, the respondent Hocken, no doubt, would not have the necessary property qualification.

In my opinion, sec. 93 does not apply to the qualification of candidates, but to the qualification of electors; but even if it were applicable to candidates, it does not help the appellant.

The real property in respect of which the respondent Hocken qualified is not and was not owned jointly by him and his wife, but down to December 10th, 1907, was owned by his wife, and after that date by him.

The rating of the husband provided for by sub-sec. 11 of sec. 33 of the Assessment Act, 4 Edw. VII. ch. 23 (O.), is not a joint rating in any sense, I think, and the object of the sub-section, whatever it may have been, was certainly not, I think, to cut down the right which a husband had to vote or to qualify on the property of his wife.

Sub-section 1 of sec. 76 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), deals with the qualification of candidates, and provides, as far as property qualification is concerned, that no person shall be qualified unless "such person has or his wife has, at the time of the election, as owner or tenant, a legal or equitable freehold or leasehold, or an estate partly freehold and partly leasehold, or partly legal and partly equitable, which is assessed in his own name or in the name of his wife on the last revised assessment roll of the municipality, to at least the value" mentioned in the sub-section "over and above all charges, liens and incumbrances affecting the same."

There is a proviso to this sub-section, which does not affect the respondent Hocken, but affects the respondents Harrison and Spence, and I shall refer to it when dealing with the latter's case.

The respondent Hocken's property qualification answers all

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Meredith, C.J. the requirements of sub-sec. 1 of sec. 76. He had at the time
1908 of the election, as owner, a legal freehold, which was assessed
not only in his wife's name, but in his own name also, on the last
REX EX REL. revised assessment roll, to the prescribed value over and above
MILLIGAN all charges, liens and incumbrances affecting it, and the objection
v. HARRISON. to his qualification, in my opinion, entirely fails.

There remains to be considered the other objection to the declaration of the respondents Harrison and Spence, made under sub-sec. 3a of section 129, and the objections to their declaration made under sec. 311.

The properties in respect of which these respondents qualified are not of the prescribed value over and above incumbrances, and they claim to be qualified under the proviso to sub-sec. 1 of sec. 76, already referred to, which provides that it shall be sufficient, where the qualification is in respect of freehold, if the person is in actual occupation of it, that the value at which the freehold is actually rated on the assessment roll amounts to not less than \$2,000, and that in that case the value shall not be affected or reduced by the encumbrances.

The form of the declaration in sec. 311 is not adapted to meet this species of qualification, and it was impossible, therefore, for these respondents to make it, and in their declarations the statement as to incumbrances is omitted, and in place of it there is the statement that the declarant is "in the actual occupation of the said premises," and, subject to the question which I shall afterwards deal with, this was, I think, a sufficient compliance with the provisions of the Act. It would be a monstrous thing that a candidate, who possesses all the qualifications necessary to entitle him to be elected, should be debarred from being elected, and, if elected, should lose his seat, because the Legislature had failed to alter the form of the declaration to be made so as to fit the changed provisions of its enactment as to the nature of the qualification required, and of the impossibility of his making the declaration according to the form.

The objection to the declaration of qualification of the respondents Harrison and Spence made after the election is that it is that the declarant "is" (*i.e.*, at the date of the declaration), instead of was, at the time of his election, in possession of the premises in respect of which he qualified.

It was admitted by Mr. Ferguson that this was not necessarily a fatal objection, and that I have a discretion to refuse to unseat if these respondents are competent, as it was admitted they are, to make a proper declaration, upon their so doing.

That I ought to exercise that discretion to prevent a mere slip from resulting in the unseating of a candidate who has been duly elected is not open to question.

The result is that, upon the respondents Harrison and Spence making and filing with the city clerk the declaration of qualification in proper form, the appeal as to them will be dismissed, and the appeal is now dismissed as to the other respondent.

There will be no costs of the appeal to either party.

A. H. F. L.

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[IN THE COURT OF APPEAL.]

THE COPELAND-CHATTERSON CO., LTD., ET AL.

v.

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March 24.

Contempt of Court—Injunction—Disobedience of—Sequestration—Stay of Proceedings—Right of Appeal—Jurisdiction of Appellate Court—"Criminal Matter"—"Execution" and "Operation" of Judgment—Variance Between Written Reasons and Formal Order—Reasonable Construction—Practice.

The plaintiffs, by the judgment at this trial of this action, were awarded an injunction restraining the defendants from continuing to make binders and sheets in imitation of the plaintiffs', for disobedience of which the issue of a writ of sequestration against the property of the defendants for contempt of court was, on March 28th, 1907, directed by a Judge, whose order was subsequently confirmed by a Divisional Court.

At the time when the order for sequestration was made, an order had been made by a Judge of the Court of Appeal, who, by his reasons in writing, delivered March 4th, 1907, directed that "execution of the injunction be stayed," pending the disposition of an appeal by the defendants from the judgment at the trial, but the formal order thereupon merely directed that "the operation of the judgment appealed from" should be stayed:—*Held*, that the Court had power to entertain the appeal, and that the order directing the issue of the writ of sequestration should be set aside, on the ground that it was made at a time when there was a stay of execution of the judgment by virtue of the order of March 4th, 1907.

Per Moss, C.J.O., and MEREDITH, J.A.:—The subject matter of the appeal was not a "criminal matter" within the meaning of the British North America Act, 1867, sec. 91, sub-sec. 27, and was not excluded from the operation of the Judicature Act and the Consolidated Rules (see Rule 4), as being matter of "practice or procedure in criminal matters."

O'Shea v. O'Shea (1890), 15 P.D. 59, and *Ellis v. The Queen* (1892), 22 S.C.R. 7, distinguished.

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THIS was an appeal by the defendant company from an order of the Divisional Court dated May 30th, 1907, dismissing an appeal from the order of Mulock, C.J.Ex.D., dated March 28th, 1907, which directed the issue of a writ of sequestration against the property of the defendant company for contempt of Court. The contempt alleged consisted of disobedience of the injunctions contained in the judgment pronounced in this action on September 22nd, 1906, restraining the defendants, their servants, agents and workmen, from continuing to make binders and sheets in imitation of the binders and sheets of the plaintiffs.

The appeal was argued on November 12th and 13th, 1907, before Moss, C.J.O., and OSLER, GARROW, MACLAREN and MEREDITH, JJ.A.

W. E. Middleton, for the appellant, contended that the order of March 28th, 1907, was irregular, in face of the fact that an order had been made staying execution of the judgment in the action; that Con. Rule 829 applied to a stay of proceedings granted by the Court as well as to a stay of execution; that a sequestration was an execution and nothing more in this country: Con. Rule 825-921; Eng. Rule 331, O. 42; *Tatham v. Parker* (1853), 1 Sm. & G. 506; *Meyers v. Meyers* (1874), 21 Gr. 214; Anderson on Executions (ed. 1889), p. 542; Encyc. of Laws of Eng., 2nd ed., vol. 5, p. 494, *et seq.*; that contempt is an act intended to pervert the administration of justice, and is a *quasi* crime: *Butler v. Butler* (1888), 67 L.J.P. 42; that there was nothing of that kind here, and that it is not intended that an individual should have the right to use the process of sequestration to punish a wrong against himself, which was not also a wrong against the State: *McLeod v. St. Aubyn*, [1899] A.C. 549; *Ellis v. the Queen* (1892), 22 S.C.R. 7; *The King v. Davies*, [1896] 1 K.B. 32, at pp. 36, 40; that the kind of contempt which is an ancillary process for enforcing a civil right is a different thing: *O'Shea v. O'Shea and Parnell, Ex p. Tuohy* (1890), 15 P.D. 59, p. 64; Daniell's Ch. Prac., 7th ed., p. 721; Encyc. of Laws of Eng., 2nd ed., vol. 3, p. 504; that there was no case where a fine had been imposed as ancillary to enforcing a judgment in this way: *Re Clements and the Republic of Costa Rica v. Erlanger* (1877), 46 L.J. Ch. 375; *In re New Gold Coast Exploration Co.*, [1901] 1 Ch.

860; *Reg. v. Payne and Cooper*, [1896] 1 Q.B. 577; *Mason v. Seeney* (1870), 2 Ch. Ch. 220; *Duncan v. Trott* (1869), 2 Ch. Ch. 487; *Re Davies* (1888), 21 Q.B.D. 236; *Re Freston* (1883), 11 Q.B.D. 545; *Harvey v. Harvey* (1884), 26 Ch.D. 644, at p. 652; *London and Canadian Loan and Agency v. Merritt* (1882), 32 C.P. 375; *London and Canadian Loan and Agency v. Morphy* (1885-8), 10 O.R. 86, 14 A.R. 577; *Hall & Co. v. Trigg*, [1897] 2 Ch. 219; *Kistler v. Tettmar*, [1905] 1 K.B. 39, at p. 43; *Berry v. Donovan* (1893), 21 A.R. 14; Daniell's Chancery Practice, 7th ed., p. 727; Snow's Annual Practice, 1907, pp. 568-9; Spence's Equitable Jurisdiction of Court of Chancery, vol. 1, pp. 390-1.

W. E. Raney and *J. Hales*, for the respondent, contended that there was no appeal against a judgment of the Court for a wilful contempt except on the point of jurisdiction, and it having been alleged that there had been a criminal contempt no appeal in this case lay: *Seaward v. Paterson*, [1897] 1 Ch. 545; *O'Shea v. O'Shea and Parnell*, 15 P.D. 59; *Davis v. Galmoye* (1888), 39 Ch. D. 322, at p. 323; that the difference between civil and criminal contempt is well illustrated in the American authorities: *New Orleans v. Steamship Co.* (1874), 20 Wall. 387, at pp. 392; *Buck Stove Co. v. Guelph Foundry Co.* (1905), 6 O.W.R. 116; *Re Chiles* (1874), 22 Wall. 157; *Bessett v. W. B. Conkey Co.* (1904), 194 U.S. 324, 335.

March 24. Moss, C.J.O.:—Upon the argument of this appeal many objections to the order pronounced by the learned Chief Justice of the Exchequer Division and affirmed by the Divisional Court were urged and very fully discussed by counsel. But in the view I take of the matter the appeal may be disposed of on the one ground, that the order was made at a time when there was a stay of execution of the judgment by virtue of the order made on March 4th, 1907. It was unfortunate that the order was not drawn up and issued in the terms in which it was pronounced, but it could not have misled the parties. Read as it should have been, in the light of the written opinion and the clear direction contained in it, there was no good reason for the parties being under the least misapprehension as to the intention or effect of the order.

The plaintiffs were well aware that the defendants sought a

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stay of execution in respect of the injunction because of the construction that was being put upon that part of the judgment awarding it—a construction which if correct seemed to compel them to give up a large part of the business they had been carrying on. They had lodged their appeal and given the security required by Rule 826. Upon that being done execution of the judgment would have been completely stayed pending the appeal, by virtue of Rule 827 (1); were it not that the judgment contained directions bringing the case within some of the exceptions. Amongst other things an injunction was awarded, thus rendering applicable sub-clause (d).

We are not called upon to determine whether, in case any part of a judgment or order appealed from falls within sub-clauses (a), (b), (c) or (d), there is a stay of execution as to any part until there has been a compliance with the conditions therein specified. Either there is no stay or a stay only as to such parts of the judgment or order as do not fall within the sub-clauses or some of them. But whichever may be the true reading, I am, speaking for myself, of the opinion that when a stay of execution of a judgment or order has been ordered under sub-clause (d) there is a complete stay of any proceeding to enforce the mandamus or injunction or to execute the judgment in respect of them.

I do not think there is any substantial difference between the effect of the stay which comes into play upon the allowance of security for costs, under Rule 827 (1), where the case falls within it, and the effect of the stay ordered under sub-clause (d). In each case what is to be stayed is execution of the judgment. And when a Judge directs execution to be stayed it is surely proper to say that it has “become stayed.” It is something that has come about or come to pass or happened by reason of the order or direction of the Judge, just as in the other case it has come about or happened by force of the direction embodied in the Rule. The provisions of Rule 829 must apply, therefore, equally to the one case as to the other. Whatever may be their defects in expression, it is evident that the framers of these Rules were intending to adopt the suggestions made by Spragge, C., in *Dundas v. Hamilton and Milton Road Co.* (1872), 19 Gr. 455, at p. 457. See *McGarvey v. Corporation of Strathroy* (1883), 6 O.R. 138.

The argument of the motion for a stay was concluded on Friday,

February 22nd, and judgment was reserved. On the same day the notice of motion for the sequestration was served. Speaking for myself, I do not think the plaintiffs should be allowed to take advantage of the reservation of judgment to commence a proceeding of this nature. If the order had been pronounced at the conclusion of the argument, the notice of motion would have been irregular and improper. But because of the mass of material and of the strenuous arguments on the plaintiffs' behalf, the matter stood to permit of a more careful perusal of the evidence and an examination of the many exhibits referred to, and judgment was not delivered until the lapse of seven juridical days. This act of the Court should not have been utilized by the plaintiffs to the prejudice of the defendants. The plaintiffs ought not to have endeavoured to anticipate the possible order by moving for a sequestration while the disposition of the motion to stay execution was in suspense.

Further, before the motion for the sequestration came before the Court on March 4th, judgment awarding a stay of execution had been delivered, and of this the parties were aware, though the formal order had not been drawn up or issued. Upon that being made to appear, the motion should not have been proceeded with. The convenient course would have been to allow it to stand over until after the disposition of the appeal. Nothing was to be gained by pressing it on. The plaintiffs, by the terms of the judgment, were amply secured against the consequences to them of the defendants having continued their business after the issue of the judgment and, by the order staying execution, against the consequences of the defendants being permitted to continue their business until the disposition of the appeal.

The question as to the punishment to be meted out to the defendants for what they had done in the past might very well remain in abeyance. It is quite manifest that the plaintiffs were not actuated so much by solicitude for the dignity of the Court or desire to vindicate its authority as—for reasons made very evident throughout the litigation—by the wish to avenge what they believed to be their own private wrongs.

The effecting of that purpose might very well stand postponed until the appeal was determined.

Wilful and contumacious disobedience or disregard of a judgment or order of the Court is not to be lightly passed over or con-

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done, and proper punishment is not to be withheld when the circumstances demand or require it, but the extent of the punishment to be inflicted may very properly be influenced by a consideration of the whole case. In the present case the pendency of the appeal and the existence of the order made or intended to be made under Rule 827 (d) were substantial reasons why the motion should have been adjourned until the result of the appeal was known, even if the effect of the order pronounced on March 4th was not, as I think it was, to stay the hand of the Court.

As to the objection raised on behalf of the plaintiffs that the order was not appealable, on the ground that it was a criminal matter, I agree with what my brother Meredith has said and with his conclusion on the question.

The appeal should be allowed, the order of the learned Chief Justice should be discharged, and there should be no costs of the appeal or in the courts below to either party.

OSLER, J.:—I agree in the result. I think that the order made by the Chief Justice of this Court on March 4th, fairly and reasonably interpreted, operated as a stay of all further proceedings in the action in the court below other than the issue of the judgment and the taxation of the costs, and therefore that it was not open to the Chief Justice of the Exchequer Division to make any order for sequestration on March 28th. But while resting my judgment on this, to me sufficient ground, I do not wish to be understood otherwise than as concurring in the views expressed in the admirable judgment of my learned brother Meredith which I have had the opportunity of reading.

MEREDITH, J.A.:—The first question for consideration is whether this Court has power to entertain this appeal; and that, as it seems to me, depends mainly on the question whether the subject matter of it is, or is not, a "criminal matter" within the meaning of those words as used in sec. 91, sub-sec. 27, of the British North America Act, 1867; and, under it, placed within the exclusive legislative authority of the Parliament of Canada. The exclusion of "practice or procedure in criminal matters" from the operation of "the Judicature Act"—see sec. 191—and of the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario—

see Rule 4—was, in my opinion, intended to affect, and does affect, only such matters as are beyond provincial legislative authority; and in my opinion such legislation and such rules apply to all matters within such legislative authority, by whatever name they may be called. That that is so is exemplified every day by the application of the Act and of the Rules to the thousand and one cases of offences against provincial laws and local municipal by-laws, which may, I think, be properly called provincial crimes, notwithstanding the aversion to the use of the latter word for fear of coming in even seeming conflict with the provisions of sec. 91, sub-sec. 27, of the British North America Act, 1867. But under the legislative authority by that Act assigned exclusively to the Provinces, is the power to impose punishment by fine, penalty or imprisonment, for enforcing any law made in relation to any matters within provincial legislative authority. So that many things which are in reality crimes, however much one may struggle to apply some other appropriate word to them, are created by provincial legislation, though quite without the meaning of the criminal law and practice and procedure in criminal matters placed within the exclusive legislative authority of the Parliament of Canada, and are not excluded from the Judicature Act or the Consolidated Rules. In other words, in my opinion, a criminal matter, if beyond provincial legislative authority, is excluded from the Act and Rules, but if within such authority, is within them. All of which, as applied to this case, means that, if the procedure for breach of the injunction, which is in question in this appeal, were in a criminal matter, such as is assigned exclusively to federal legislative authority, no appeal lies under the Act and Rules; whilst if it were not, they apply, and an appeal lies just as it does in every like case. The decisions in England require much consideration, and can be applied safely only with much discrimination, for at least two obvious reasons: (1) they interpret an enactment different in several respects from those upon which this case depends, and (2) there are decisions and decisions as well as “contempt and contempts.” The Imperial enactment excludes the jurisdiction of the Court of Appeal “in any criminal cause or matter” in very unmistakable language, thus: “The determination of any such question by the Judges of the said High Court in manner aforesaid shall be final and without appeal; and no appeal shall lie from any judgment of the said High

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Court in any criminal cause or matter" . . .; and it has been said in the Court of Appeal in England, in regard to this enactment, that, "The result of all the decided cases is to shew that the words 'criminal cause or matter' . . . should receive the widest possible interpretation. The intention was that no appeal should lie in any 'criminal matter' in the widest sense of the term, this Court being constituted for the hearing of appeals in civil causes and matters:" *Ex p. Woodhall* (1888), 20 Q.B.D. 832. Plainly, I think, all that is inapplicable to the words "the practice or procedure in criminal matters," as used in the Judicature Act and in the Consolidated Rules of this Province; where it seems very plain to me that they were used for the one purpose of avoiding any invasion of the exclusive legislative authority of the Parliament of Canada; it seems to me quite impossible to consider that they were meant to exclude, or do exclude, that large class of cases arising daily such as I have had the temerity to call provincial crimes, and to leave them without any sort of written rules or practice; none under the Criminal Code or other federal legislation because within the exclusive authority of provincial legislation, and none under the latter legislation because senselessly excluded from its nearly two hundred sections and over twelve hundred rules. The words "criminal matters," which we have to interpret, therefore seem to me to comprehend only matters which are criminal in the strict meaning of that word, criminal matters such as are under the British North America Act, 1867, committed to the exclusive authority of the Parliament of Canada. An example will, perhaps, better than anything I could say, make clear that which I mean. In the case of *Mellor v. Denham* (1880), 5 Q.B.D. 467, the subject matter of the appeal was a case stated by Justices as to an information for contravention of a by-law of a school constituted under an Education Act. The penalty for the breach of the by-law was a fine of five shillings, the utmost that the Act allowed. The Court of Appeal was clearly of opinion that the appeal was one in a "criminal matter" contrary to the provisions of the Imperial enactment which I have quoted. It can hardly be contended but that here the holding must have been that it was not a criminal matter within the meaning of the Act and Rule in question in this appeal; that it was merely a provincial penalty, not a crime in the sense in which that or the like words are used in that Act and those Rules

and in the British North America Act, 1867. Prosecutions for the infraction of by-laws passed by municipal councils and boards of education, under the authority of provincial legislation, are of too frequent occurrence to permit of any doubt on this subject.

Generally speaking, it is said that contempt of court is a criminal offence or matter, and that is no doubt so when speaking of contempt of court pure and simple and in the popular acceptance of the term; but, as has been said, there are contempts and contempts, and some are entirely civil in their character to which civil proceedings only are applicable. But dealing with those of a criminal character, are such of them as affect the dignity of, or the administration of justice in, a provincial court, within the exclusive legislative authority conferred on the Parliament of Canada? I confess that I would have thought not; that I would have thought them within the exclusive legislative authority of the Provincial Legislature, and so only provincial crimes. And none the less so as the administration of justice in the Province, including the constitution, maintenance and organization of provincial Courts, both of civil and of criminal jurisdiction, is, by the British North America Act, 1867, committed to the exclusive authority of the Provincial Legislatures: sec. 92, sub-sec. 14; though in the Federal Courts they would be exclusively federal in character and treatment. But a decision of the Supreme Court of Canada in the case of *Ellis v. the Queen*, 22 S.C.R. 7, compels a contrary conclusion. The Court there held the offence to be a crime in the sense in which criminal law and practice and procedure in criminal matters are dealt with in the British North America Act, 1867, and declined to hear the appeal because the Criminal Procedure Act, now contained in the Criminal Code, prohibited an appeal to the Supreme Court of Canada when the Judges of the Court below were unanimous in their judgment, as they were in that case. It may also be pointed out that the Criminal Code gives a right of appeal generally only against a verdict or judgment on the trial of a person for an indictable offence: sec. 1013. The judgment of the Supreme Court of Canada in that case seems to have simply followed the judgment of a Court of Appeal in England in the case of *O'Shea v. O'Shea and Parnell*, 15 P.D. 59, and so we are precluded from considering a contempt of Court of the character of those which were the subject matter of

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those cases, anything other than a criminal matter such as would exclude the power of this Court to entertain an appeal respecting it.

It is necessary, then, to consider the character of the disobedience, or contempt, of Court in this case; and to find whether it was, or was not, such as that involved in those cases. It was obviously different in these respects; it was not that of a stranger to the action, but was that of the defendants in it; it was not something aimed at the dignity of the Court or calculated to prejudice or interfere with the due administration of justice, it was but the failure of the defendants to observe an injunction against them in it—to obey the order of the Court made against them in it—for the sole benefit of the plaintiffs, and at their instance. And the writ of sequestration which was directed to issue against them was a writ commonly employed in the Court of Chancery for the enforcement of civil rights; and it is said that in England if a party guilty of a breach of injunction is a peer, a member of Parliament or a body corporate, the proper course is to move that a writ of sequestration shall issue: Kerr on Injunctions, 3rd ed., 647-8. In this case the defendants are a body corporate, and the proceedings were commenced against them by the plaintiffs in their own interests and for their own benefit. By their notice of motion they sought a writ of sequestration for breach of an injunction granted to them at the trial of the action, or such *other order as they might be entitled to*, and the costs of their application. The defendants' answer to the application was that upon the proper construction of the judgment against them they had not been guilty of any disobedience, and that in any case they had acted in good faith and upon the advice of counsel, and that if they had erred they regretted it and were ready and willing to yield obedience to the judgment at the trial as the Court might interpret it. The learned Chief Justice of the Court of Exchequer, before whom the application was heard, considered that there had been a breach of the injunction for which there was no justification; and directed that, unless the defendants complied with certain terms which he imposed, an order for a writ of sequestration should go. The formal order made upon the application declares, among other things, "that the plaintiffs are entitled to the issue of an order for a writ of sequestration as claimed in the notice of motion served," and orders the same accordingly, but goes on to provide that the defendants may elect to "present an apology to the Court" and "pay into court by way of fine a sum equal to their profits accruing

from sales made in breach of the said injunction down to the fourth day of March, 1907, and that if such profits shall be found to amount to less than \$250, then that they should pay a fine of \$250, and that although the amount of the fine is to be a sum equal to the profits, its payment is not to be regarded as a disposition of the profits themselves," and then further provides that in default of such election the writ of sequestration should issue, and that the defendants should forthwith, after taxation, pay the costs of the motion as between solicitor and client. No further disposition of, or direction as to the proposed fine is made; but, as it is to be paid into Court, the intention must have been, if the matter was thought of at all, that it should be subject to the power of the Court, and so might be awarded to the plaintiffs for any loss which they might have sustained by reason of the breach of the injunction; it was certainly not dealt with as fines in criminal cases are. The unusual form of the order creates some uncertainty. Solicitors, however experienced or inexperienced, will generally find it much better to adhere to established forms and modes of procedure. But some things are quite clear from doubt or uncertainty; the proceedings in question were taken by the plaintiffs for their own benefit, to enforce obedience by the defendants to the injunction made against them, and in favour of the plaintiffs, at the trial, and so far were purely of a civil character. The uncertainty as to the purpose and nature of the "fine" is now quite immaterial, as the defendants did not elect to submit to it, and so the order is simply one for the issue of the usual writ of sequestration. No fine has been imposed, and none might ever be, no matter what subsequent proceedings in respect of the order, or otherwise in the action might bring forth. This case is therefore plainly one different in all its features from the cases of *O'Shea v. O'Shea* and of *Ellis v. The Queen*.

If I am right in the conclusion that the last named case compels us to follow the cases in England as to the meaning of the words "criminal matters," in so far as it affects the right to appeal to this Court in cases of disobedience to injunctions or orders and of contempt of court, it is necessary now to look further into the practice there in such matters, in order to see to what type of case that in question belongs, and whether there would be a right of appeal in it there. There are several types of cases to which reference may be necessary:—

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(1) Cases of contempt of court pure and simple, by a stranger, of which *O'Shea v. O'Shea* and *Ellis v. The Queen* are examples; and to this class, as I have said, it is very obvious that this case does not belong. In such case there is no appeal to the Court of Appeal in England.

(2) Cases of contempt of court by solicitors and other officers of the Court, as such officers, which are exceptional cases and can have no great bearing on such a case as this. *In re Freston*, 11 Q.B.D. 545, is a case of this kind; see also *In re Dudley* (1883), 12 Q.B.D. 44; in both of which cases an appeal was entertained.

(3) Cases of a more compound nature, cases in which the accused is a party to the action or proceeding in regard to which the complaint is alleged to have been committed, and in which the committal or writ sought may have for its purpose both the compelling of obedience to an order or judgment or writ of the Court and punishment for disobedience to it; of which Dr. Barnardo's case is an example; and which is not a criminal matter, and so an appeal lies to the Court of Appeal in England. In that case—*The Queen v. Barnardo (Tyne's Case)* (1889), 23 Q.B.D. 305—the appeal was against an order of a Divisional Court quashing a return to a writ of *habeas corpus*, and granting an attachment against Dr. Barnardo for contempt of Court in not obeying the writ. It was said that the object of the attachment was to compel obedience to the writ, and so it was, but it had the double purpose of punishment for disobedience. Assuming belated compliance, might not punishment be inflicted in the shape of a fine or imprisonment for the contempt which had occurred? And assuming non-compliance because of inability to recover custody of the child, would not some punishment have been inflicted for the contempt before it was considered purged? *Barnardo v. Ford, Gossage's Case*, [1892] A.C. 323, shews pretty plainly that the attachment ought not to have been granted in *Tyne's Case*, but that does not affect this question. Cotton, L.J., in *O'Shea v. O'Shea*, distinguishes Dr. Barnardo's case from that case, as in the latter the whole proceeding was to punish and not to obtain anything for the petitioner's benefit. Cases of this class are held to be appealable to the Court of Appeal in England.

(4) Cases in which there is a little more complication, namely, those in which the offender is a stranger to the action, but aids and

abets a party to it in disobedience to its order or injunction against such party, of which *Jarmain v. Chatterton* (1882), 20 Ch.D. 493, and *Seaward v. Paterson*, [1897] 1 Ch. 545, afford examples, in each of which an appeal to a Court of Appeal in England was entertained.

(5) The ordinary case of failure to comply with the requirements of any judgment or order of the Court for which committal or attachment or sequestration may be imposed or granted; familiar instances occur under Consolidated Rules 853 and 857 and the like Rules; also Consolidated Rule 907; and also in the Division Courts under judgment summonses; and there are many others. In such cases an appeal lies; is expressly provided for in the Rules, and is subject to such of the rights of appeal therein, and in the Judicature Act, provided, as are applicable to them. I mean, of course, cases in the High Court.

The case in hand seems to me to belong to this last-mentioned class; a case of pursuing the ordinary civil method of enforcing obedience to the judgment of the Court in the plaintiffs' favour and for their benefit; but if that were not so this case most certainly does not fall within the class first mentioned or the second class, and if it fall within any of the others an appeal would lie in England, and more certainly I think lies here. Put upon the highest grounds for the plaintiffs, it could but come within the class of which Dr. Barnardo's case is an example, and very plainly within the words of Lopes, L.J., expressed in the case of *O'Shea v. O'Shea*: "There are different kinds of attachment for contempt. One kind of attachment is to force obedience to an order made in a civil action, or proceeding, against one of the parties, in respect of something the doing or not doing of which is not a criminal act. That would not be an order in a 'criminal cause or matter' within sec. 47. The case of *Regina v. Barnardo* is an example of that kind." These words are quoted and the views expressed in them commented on in the case of *In re Evans, Evans v. Noton*, [1893] 1 Ch. 252.

I may add that the rule in the Courts of the United States of America is said to be that "criminal contempt is conduct that is directed against the dignity and authority of the Court; and that civil contempt consists in failing to do something ordered to be done in a civil action for the benefit of the opposing party therein:" *Cyclopedia of Law and Practice*, vol. 9, p. 6.

Unfortunately, as some seem to have thought, the decisions

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now require, for certain purposes, that contempt of Court be divided into two classes, those which are civil and those which are criminal in character: see *Harvey v. Harvey* (1884), 26 Ch. D. 644; and no other line of demarcation was perhaps ever drawn between them than that which is said to be adopted in the Courts of the United States of America, but it has not always been the guide, and so not a few cases in those Courts, as well as in the Courts in England, may be found to be upon the wrong side of it.

I may add that, for the purpose of determining whether a case is appealable or not, the fact that outer doors may be broken under a writ of sequestration is no test, for that might be done as much whether the writ were issued in an entirely civil proceeding as in a doubtful case, such as contempt of Court. Nor is the fact that no privilege from arrest may exist in the particular case: for there were appeals in both *In re Freston* and *In re Dudley*; see also *In re Evans*.

The case of *Stevens v. Metropolitan District R.W. Co.* (1884), 29 Ch.D. 60, affords an example of an appeal entertained and allowed in England in a case similar to this in its crucial features. It was a case of an injunction and an application for a writ of sequestration. The Court found that, under colour of doing something else, the defendant had violated the injunction; but the plaintiff not pressing for the writ, the defendants were found guilty of a breach of the injunction and ordered to pay the costs of the motion: an appeal was entertained and allowed. Could it have made any difference if, as here, the writ had been granted after the defendants' refusal to comply with some proposition made by the Judge?

It is true that the Parliament of Canada has made disobedience—without any lawful excuse—to any lawful order, other than for the payment of money, made by any Court of justice, or by any person or body of persons authorized by statute to make or give such order, an indictable offence punishable with one year's imprisonment, unless some other penalty is imposed or other mode of proceeding is expressly provided by law: Criminal Code, sec. 165; and this seems to be applicable to a corporation, because under sec. 1035 there is power to impose a fine in lieu of as well as in addition to any imprisonment for five years or less. But this does not affect any civil proceedings. If the plaintiffs had desired to avail themselves

of this criminal law they would have been obliged to proceed in the usual way to have the defendants indicted and tried as criminals. Indeed, this provision seems to me to favour the view that the proceedings which the plaintiffs took in this action were not criminal and are appealable.

Then, having jurisdiction, is there any reason why the appeal should not be considered on its merits? In case of contempt of Court pure and simple, I mean of the criminal character under Imperial legislation, the rule seems to be that no appeal lies, or at all events that none should be entertained: see *Ex p. Fernandez* (1861), 10 C.B.N.S. 3; and *McDermott v. The Judges of British Guiana* (1868), L.R. 2 P.C. 341. The cases, *In re Pollard* (1868), L.R. 2 P.C. 106, and *In re Special Reference from the Bahama Islands*, [1893] A.C. 138, were not appeals, but special references under Imperial enactments. The rule that such cases are not reviewable seems to obtain generally in the Courts of the United States of America: see *Cyclopedia of Law and Practice*, vol. 8, pp. 61, 62; and *Encyclopedia of Pleading and Practice*, vol. 4, pp. 4 and 5. This rule does not, of course, depend upon the Imperial enactment restricting the right of appeal, before referred to, but is entirely independent of it. However, this case not being one of that character, the rule has no application to it, but the provincial enactment and the Consolidated Rules apply, and under them an appeal is plainly given to this Court, by leave which has been given: see, 4 Edw. VII. ch. 11, sec. 2, sub-secs. 76, 76 (g) and 76 (2).

But it is also a well established rule that in matters in which the Court or Judge has a discretion and it has been exercised, a Court of Appeal will not interfere except upon very substantial grounds: see *Hulbert v. Cathcart*, [1896] A.C. 470. In this case, however, there is first the important question whether there was any power to make the order, in view of the order of this Court staying proceedings in the action; and afterwards there are the facts that the case involves the question of the proper principles applicable to such cases as well as to the issue of writs of sequestration and the enforcement of obedience to the orders and judgments of the Courts generally, of which I cannot but think the parties at the outset, and in their presentation of the case in the first instance, had somewhat hazy notions. On February 13th the defendants gave notice of motion before the Chief Justice of Ontario for a stay of the

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operation of the injunction pending an appeal to this Court against the judgment pronounced against them at the trial of the action, execution of the judgment being in other respects stayed under Consolidated Order 827. The expression "operation of the injunction" seems to have been borrowed from Holmsted & Langton's Ontario Judicature Act—see p. 1067—where it is said that "proceedings to commit a defendant for breach of an injunction will not be stayed pending an appeal from the judgment or order granting the injunction unless the operation of the injunction has been suspended under clause (d) of this Rule." The motion was heard on March 4th, when the Chief Justice, giving his reasons in writing, directed that "execution of the injunction be stayed pending the disposition of the appeal;" but in drawing up the formal order thereupon the words of the notice of motion were resorted to and it was ordered that "the operation of the judgment appealed from . . . be stayed . . ." Subsequently, on June 1st, an order was made by the same Judge substituting the word "execution" for the word "operation" in the earlier order, but without prejudice to the rights of the plaintiffs in respect of any proceedings in the lower Court in the meantime. The notice of motion for the writ of sequestration was given on February 22nd for March 4th, and the order for the issue of the writ was made on the 28th day of that month. But for the use of the word "operation" for "execution," proceedings on the motion for the writ would have been plainly stayed, under Consolidated Order 829; and now that it is quite plain that the intention and direction of the Chief Justice was that execution of the judgment should be stayed, the defendants are surely entitled to have effect given to it upon proper terms, at the worst. When the judgment of the Divisional Court was pronounced the amending order of the Chief Justice had not been made; and that Court was naturally impressed with the idea that the word "operation" had been designedly used instead of "execution;" if it had been known that it was a mere slip of the draughtsman, in view of the written direction of the Chief Justice, I cannot think that such drastic process as that in question would have been supported, or that it would in the first place have been directed; especially as no harm could come to any one by allowing the matter to remain in abeyance until the result of the appeal was known. It would be distinctly discreditable to the administration of justice

if the matter could not yet be set right; if the possibly disastrous effect of the slip made could not yet be avoided; if the clear intention and the plain words of the Chief Justice must be frustrated. The words used in Rules 827 and 829 may not have been as well and comprehensibly chosen as they might have been, but it is very plain that paragraph (d) of Rule 827 was intended to remove the subject of mandamus and injunction from any region of uncertainty, and to supply the power which in the cases of *Gamble v. Howland* (1852), 3 Gr. 281, and *McLaren v. Caldwell* (1882), 29 Gr. 438, was considered wanting, and to put them on the same footing as other proceedings stayed, or which might be stayed, so that their effect from their inception might be held in abeyance pending the appeal, and the words used are sufficient to convey that intention.

But, in addition to this point, this is not a case in which the extreme remedy ought to have been employed. If in cases for minor surgery the heroic remedies are applied, what is to be done in cases where very much is involved and disobedience is flagrantly contumacious and defiant? Here the defendants had failed to obey the order of the Court made at the trial of the action, that they should discontinue making certain binders, holders and sheets (merchants' blank account books) in imitation of the plaintiffs. They pleaded that upon the proper interpretation of the order made at the trial they had not disobeyed it, and that they had acted, as they in fact had, on the advice of counsel upon its interpretation. They were considered to have been wrong in their interpretation and to have disobeyed the order. Acting on the advice of counsel was of course no justification, but at the least it might well have had some palliative effect. They had appealed against the judgment at the trial; that appeal stayed proceedings in the action, except as to the injunction; and in regard to that they had moved for a stay of proceedings which the Rules now provide for; and on that motion the Chief Justice of Ontario had spoken of the substantial character of the appeal and of the propriety of staying the effect of the injunction which had been granted, in these words: "The matters involved are substantial and important, both as regards the questions at issue and the consequences to the parties of the final result. The effect of the injunction is very far reaching as regards defendants' business, and it will be no injustice to plaintiffs to give to defendants a fair opportunity of

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prosecuting their appeal without subjecting them for the present to the serious—almost irreparable—consequences to their business that a compliance with the injunction seems to involve. The defendants are, as I think, appealing in good faith.”

The plaintiffs were in no danger of any money loss, for the judgment gave them not only an injunction, but at their election either the profits made by the defendants or damages, which, under the present practice, would be calculated down to the time of their ascertainment or assessment in the Master’s office upon the reference directed also by the judgment at the trial. Under these circumstances I cannot think it acting upon the proper principles applicable to such cases to award at their instance, and as that which “the plaintiffs are entitled to,” the generally ultimate and extreme remedy of “grand distress;” and the less so as the effect might, and probably would, be great loss, not only to those who were really answerable for the failure to obey the injunction, but also entirely innocent shareholders. Generally speaking, the writ of sequestration is the last resort, the extreme remedy: see Consolidated Rules 857, 858 and 859; also *Nelson v. Nelson* (1874), 6 P.R. 194; *In re Davies*, 21 Q.B.D. 236; *In re Clements and the Republic of Costa Rica v. Erlanger*, 46 L.J. Ch. 375, and *Hulbert v. Cathcart*, [1896] A.C. 470. I cannot but think that in all the circumstances of the case the most which the plaintiffs were “entitled to” was their costs of the motion, which motion might well have been allowed to stand over until the final determination of the action—unless other order was made in the meantime—so that it might be seen whether they in fact had lost anything by the disobedience to the order, before determining what they were “entitled to;” if indeed, seeing that their motion was made after the motion for the stay of proceedings and that they were fully protected by the judgment in respect of profits or damages, the motion had not been dismissed, leaving the parties to bear each their costs of it.

Obedience must be yielded to the orders of the Court; but harm may be done by too great severity as well as by too great leniency in enforcing such obedience.

It is not necessary to deal with the point made by Mr. Middleton that a writ of sequestration cannot under the practice in this Province be sued out against a corporation because the Consolidated Rules do not contain any such Rule as O. 42, r. 6, of the Rules

of the Supreme Court, 1883, in force in England; but it may be observed that the Consolidated Rules expressly provide that in matters not provided for in them the practice so far as may be shall be regulated by analogy to them: Rule 3.

I would therefore allow this appeal and discharge the order made by the Chief Justice of the Exchequer Division, and would make no order as to costs of the appeal or of any of the proceedings in the High Court. If costs were given, probably the plaintiffs should be awarded costs up to the time of the making of the amending order, and the defendants costs subsequent to that, the effect of which would be that this needless litigation would be continued as long as it would be possible to continue it, with the result that the costs would be considerably increased and the parties be left probably as they are—that is the costs of the one would counter-balance the costs of the other. It is well to end this off-shoot of the litigation between the parties, and it is well to discourage rabid litigiousness, and I know of no more sobering effect than that produced by giving each party the privilege of paying for the part he has taken in avoidable litigation and for such pleasure as he has had from it.

GARROW and MACLAREN, JJ.A., concurred.

Appeal allowed.

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Intoxicating Liquors—Liquor License Act—Municipal Corporations—By-law to Reduce Number of Licenses—Construction of Statutes and By-laws—Unauthorized Limitation—Ultra Vires—Meaning of "Year."

By sub-sec. 1 of sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, the council of every city is authorized by by-law passed before the 1st of March in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year, beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by the Act. Under the authority of this sub-section, the municipal council of the city of Toronto, on February 22nd, 1904, passed a by-law, the second section of which provided that "the number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year." On January 27th, 1908, the council passed a by-law, intituled "A by-law to reduce the number of tavern licenses to 110," the effect of which was to amend the second section of the first by-law, so that it would read: "The number of tavern licenses to be issued shall not exceed the number of 110 in any one year." The number of licenses issued by the License Commissioners for the license year commencing on May 1st, 1907, was 144, but under sec. 8, sub-sec. 3, of the Act, they had authority, if special grounds were shewn, to issue the six unissued licenses at any time before 1st of May, 1908:—

Held (RIDDELL, J., dissenting), that the council by the by-law of 27th January, 1908, had, in effect, assumed to limit the number of licenses which the License Commissioners had authority to issue for the license year beginning on the 1st May, 1907, and that the by-law was therefore *ultra vires*, and should be quashed.

THIS was an appeal by the city of Toronto from the judgment of Meredith, C.J.C.P., on a motion to quash a by-law passed by the municipal council of the city of Toronto to reduce the number of tavern licenses, the terms of which are set out in the judgments.

The motion before MEREDITH, C.J., was argued on March 11th 1908, in Weekly Court.

W. T. J. O'Connor, for the applicant.

J. S. Fullerton, K.C., for the city of Toronto.

March 21. MEREDITH, C.J.:—This is a motion by a ratepayer of the city of Toronto to quash by-law No. 5040, passed by the municipal council of the city of Toronto on January 27th, 1908, intituled "a by-law to reduce the number of tavern licenses to 110."

The by-law was passed under the authority of sub-sec. 1 of sec. 20 of the Liquor License Act (R.S.O. ch. 245), which reads as follows:

"20. (1) The council of every city, town, village or township may, by by-law to be passed before the first day of March in any

year, limit the number of tavern licenses to be issued therein for the then ensuing license year beginning on the first day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by this Act."

The by-law in question consists of one section, which is in these words:

"Section 2 of by-law No. 4311, being 'a by-law relating to tavern and shop licenses,' is hereby amended by striking out the word 'fifty' in the second line thereof and substituting the word 'ten.'"

By-law No. 4311 was passed on February 22nd, 1904, and is in these words, omitting the signatures to it:

"No. 4311.

"A by-law relating to tavern and shop licenses.

"(Passed February 22nd, 1904.)

"The municipal council of the corporation of the city of Toronto enacts as follows:—

"(1) There shall be paid for every tavern license issued for the year, beginning on the first day of May, 1904, and in every succeeding year, a duty of two hundred dollars in addition to the license duties payable under the provisions of any statute of the Legislative Assembly of the Province of Ontario.

"B. 2455, s. 1; part new.

"(2) The number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year.

"B. 2455, s. 2.

"(3) Any shopkeeper hereafter taking out a shop license as defined by ch. 245 of the Revised Statutes of Ontario, entitled 'An Act respecting the sale of Fermented or Spirituous Liquors,' for the sale of liquors in the city, shall confine the business of his shop solely and exclusively to the keeping and selling of liquor.

"B. 2455, s. 3; part new.

"(4) There shall be paid for every shop license issued for the year, beginning on the first day of May, 1904, and in every succeeding year, a duty of two hundred dollars, in addition to the license duties payable under the provisions of any statute of the Legislative Assembly of the Province of Ontario.

"B. 2455, s. 4; part new.

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“(5) The number of shop licenses to be issued shall not exceed the number of fifty in any one year.

“B. 2455, s. 5.”

By sub-sec. 3 of sec. 8 of the Liquor License Act it is provided that “Where special grounds are shewn, the license commissioners may direct one or more licenses to issue at any time after the said first day of May within the limit authorized by this Act, provided that the petition or application therefor has been filed with the inspector on or before the first day of April next preceding.”

The number of licenses issued by the commissioners for the license year commencing on May 1st, 1907, was 144, though applications had been made before April 1st of that license year for 152, and the number of licenses authorized for that license year was 150. The commissioners had authority, therefore, if special grounds were shewn, to issue at any time before the first day of May next six additional licenses.

The main objection to the validity of the by-law in question is that while sub-sec. 1 of sec. 20 confers power to limit the number of tavern licenses to be issued for the ensuing license year beginning on the first day of May and for future license years, the by-law, according to what, as is contended, is its true construction, assumes to limit the number to be issued in the calendar year 1908 and in future calendar years.

It is not, I think, open to question that if sec. 2 of by-law No. 4311 as amended by the by-law in question stood alone, the words “in any one year” must be read as meaning “in any one calendar year”: *Gibson v. Barton* (1875), L.R. 10 Q.B. 329; *In re Trustees of School Section No. 5 of the Township of Asphodel and Humphries* (1894), 24 O.R. 682; *In re Goulden and the Corporation of the City of Ottawa* (1897), 28 O.R. 387; but Mr. Fullerton contended that, reading sec. 2 with the other sections, and especially with sec. 1, it sufficiently appears that what is meant by the word “year” is a license year beginning on the first of May.

The rule of construction invoked by Mr. Fullerton is referred to by Lord Denman, C.J., in *Regina v. Poor Law Commissioners, In re Holborn Union* (1838), 6 A. & E. 56, at p. 68, as follows: “We disclaim altogether the assumption of any right to assign different meanings to the same words in an Act of Parliament on the ground of a supposed general intention of the Act.”

In *Courtauld v. Legh* (1869), L.R. 4 Ex. 126, the rule is referred to by Cleasby, B., at p. 130, as follows: "It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament or other document."

In *Smith v. Brown* (1871), L.R. 6 Q.B. 729, Cockburn, C.J., at p. 733, thus refers to the rule: "No doubt if there were anything in the other provisions of the Act which shewed that the term 'damage' had been employed in a more comprehensive sense, we ought not to restrict the operation of the enactment by too nice a regard to the language used."

Again, in *In re Kirkstall Brewery Co.* (1877), 5 Ch.D. 535, Bacon, V.-C., at p. 537, says: "Its 'capital' must mean the same thing in both Acts of Parliament."

In *Spencer v. The Metropolitan Board of Works* (1882), 22 Ch.D. 142, Jessel, M.R., says, at p. 162: "The first observation to be made on sec. 33 is that we ought to find out its meaning if we can from the section itself. If we can do that we need not have recourse to the use of the word 'take' in the other sections of the Act. If we cannot, then I agree with the principle which was laid down by Mr. Justice Chitty that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and that therefore we may look at the other sections to see in what sense the word is there used."

It appears to me that the rule ought not to be applied to sec. 2. If, as Jessel, M.R., says, the meaning of the section can be ascertained from the section itself, there is no need to have recourse to the rule, which I understand to mean that unless when the section is read the sense in which a word in it is used is doubtful, the rule is not to be applied. How can the rule be applied to the interpretation of sec. 2, the meaning of the words "any one year" not being, as I think it is not, doubtful. But even if the rule is to be applied, how can it be said that the word "year" means "license year"?

In secs. 1 and 4, where the license year is intended to be referred to, the year is spoken of as beginning on the 1st day of May, thus indicating that the license year is referred to, and sec. 3, it will be observed, is by its terms made applicable to licenses taken out after the date of the by-law.

Why may it not be that the council intended what is at all events *primâ facie* the meaning of the language it has used in

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sec. 2, that though the increased duty was to be applicable only to licenses issued in the year beginning on the 1st day of May, 1904, and in succeeding license years, the limitation of the number of tavern licenses to be issued was to apply to the calendar year in which the by-law was passed and to every succeeding calendar year?

If I am wrong in this view, and the words "in any one year" are to be read "in any one license year," the by-law is still open to the objection that it assumes to impose a limitation which the council had no authority to impose.

Upon that reading of the by-law, the number of licenses authorized to be issued for the license year beginning on the 1st May, 1907, was 150, and, as I have already pointed out, the commissioners had authority, under sub-sec. 3 of sec. 8 still to issue in that year, between the date of the by-law and the 1st May next, six additional licenses, and these six licenses they could not issue without contravening the provisions of sec. 2 of by-law 4311 as amended. The only by-law the council had authority to pass was one limiting the number of licenses to be issued for the ensuing license year beginning on the 1st May, 1908, and in future license years, and inasmuch as by their by-law they in effect assumed to limit the number of licenses which the commissioners had authority to issue for the license year beginning on the 1st May, 1907, the by-law is in my opinion *ultra vires*, and should be quashed.

The effect of the by-law will be to deprive persons now engaged in the business of tavern keeping of the right to carry on their business so far as it consists of selling intoxicating liquor, and must necessarily have the effect of depreciating the value of their property, and there is no reason, therefore, why the council should not be held, in the exercise of its wide powers under sec. 20, to a strict compliance with the law, or why any discretion which the Court possesses to refuse to quash a by-law should be exercised in favour of the by-law in question.

With the policy of the legislation the Court has nothing to do. Whether it is harsh in its operation upon the class affected by it, or a wise measure in the public interest, it is not the province of the Court to inquire; but it is the duty of the Court, when the limits of the powers conferred upon the council are overstepped, to annul its legislative act, and being of opinion that by the by-law in question

the council has overstepped the limits of its authority under the provisions of sec. 20, I have no alternative but to quash the by-law, and to quash it in its entirety, for it is not a case in which an invalid part is severable from a valid part of a by-law, and the latter may be left to stand.

The respondents must pay the costs of the applicant.

The appeal was argued on April 15th, 1908, before FALCONBRIDGE, C.J.K.B., and TEETZEL and RIDDELL, JJ.

J. S. Fullerton, K.C., and *F. Mackelcan*, for the appellants, argued that the by-law should be read as a whole, and that a defect in one clause should not invalidate the whole by-law; that the word "year" in the by-law must be construed in the light of the statute and of the whole by-law, and should not be construed in such a way as to make the city appear to intend to do what it had no right to do; and that to construe the by-law as intended to interfere with the unissued licenses for 1907-8 would be to give it a retroactive operation which should not be done. They referred to the following: *Smith v. Callander*, [1901] A.C. 297, at p. 305; *Re Boylan and the City of Toronto* (1887), 15 O.R. 13.

W. T. J. O'Connor, for the respondent, contended that the by-law was bad in form and ought to be quashed; that the Court cannot read the statute into the by-law, and that when the meaning of one section is clear it cannot be controlled by other sections, and that if this by-law was to be upheld by reading into it the whole statute, any by-law might be valid. He referred to the following: *Lumley on By-laws*, p. 148; *Queen v. Governors of Darlington School* (1844), 6 Q.B. 682; *Gibson v. Barton*, L.R. 10 Q.B. 329; *Regina v. Smith* (1899), 31 O.R. 224; *Regina v. Applebe* (1899), 30 O.R. 623; *Spencer v. Metropolitan Board of Works*, 22 Ch.D. 142, cited in *Maxwell on Statutes*, 4th ed., pp. 5, 6; *Coe v. Lawrance* (1853), 1 E. & B. 516; *In re Castioni*, [1891] 1 Q.B. 149.

Fullerton, in reply, referred to *Maxwell on Statutes*, 3rd ed., p. 90; *Brodie and the Corporation of the Town of Bowmanville* (1876), 38 U.C.R. 580, 592.

April 23. FALCONBRIDGE, C.J.:—I have had the privilege, and I may also say the pleasure, of perusing the very able judgment of my brother Riddell, but I find myself unable to concur in the result.

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It is not necessary for me to express any opinion on the first branch of the case, as I think the judgment appealed from is clearly sustainable on the second ground, and I agree with the opinion of the Chief Justice of the Common Pleas for the reasons stated by him, to which I have nothing to add.

One of my learned brothers cites from *Meredith v. City of Toronto* (1895), 22 A.R., at p. 207, as follows: "Municipal corporations, in the exercise of the statutory powers conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts." The judgment proceeds: "*A fortiori* should this be so where their by-laws are directed against the common-law right and the liberty and freedom of any subject to employ himself in any lawful trade or calling he pleases."

A fortissimo, I venture to think, should this be so in a case like the present. The keeping of a tavern or hotel is still a lawful trade or calling. The applicant swears that if his license shall be refused he will "be much prejudiced and seriously injured financially." This no doubt would be the position of from thirty to forty persons who have presumably invested considerable sums of money in complying with the requirements of the law and of the commissioners.

I agree, therefore, that any discretion which the Court possesses ought not to be exercised in favour of the by-law, but at the same time it is hardly necessary to say that if I had as strong a view as my brother Riddell has, in the same direction, no consideration of cases of individual hardship would prevent my supporting the by-law.

The order will be affirmed and the appeal of the city dismissed with costs.

TEETZEL, J.:—The question in this appeal is whether the by-law comes within or exceeds the authority conferred on the municipal council by sec. 20, sub-sec. 1, of the Liquor License Act, which reads as follows: [setting it out].

It is a well-settled principle of construction that enactments which create new jurisdiction or delegate subordinate legislative power must be strictly construed and the subordinate legislation must not be in excess of the statutory power authorizing it: Maxwell on Interpretation of Statutes, 4th ed., 441, 446.

The jurisdiction of every municipal council is by sec. 325 of the Municipal Act (1903), 3 Edw. VII. ch. 19, confined to the municipality which the council represents, except where authority beyond the same is expressly given. A by-law professing to affect persons or property both within and beyond the limits of the municipality would, unless expressly authorized by statute, be clearly void in its entirety. See Biggar's Municipal Manual, 11th ed., 333, and cases there cited.

On the same principle, if the Legislature delegates to the municipal council the power to pass by-laws in reference to certain specified matters, the by-law would be entirely void which purported to deal not only with those matters but with others not authorized by the delegating authority or otherwise beyond the jurisdiction of the council.

Now this by-law is objected to because it is claimed that it is in excess of the powers vested in the council by sec. 20 above quoted, in that it is not confined to limiting the number of licenses to be issued for the "then ensuing license year" beginning on the first day of May, 1908, being the license year 1908-9, but attempts to limit the licenses to be issued "in any one year," which expression is not less comprehensive than "in every year."

By-laws, like statutes, begin to speak from the date of promulgation, unless otherwise expressly provided for. The by-law in question became operative on the 27th day of January, 1908, which was during the license year 1907-8, and it says, as the result of amending the former by-law, that "the number of tavern licenses to be issued shall not exceed the number of one hundred and ten in any one year."

The difficulty in determining whether the by-law is within the power of the council arises from the use of the words "in any one year."

I am unable to agree with the learned Chief Justice that the word "year" should be construed as calendar year. I think that the rule of construction which gives the same meaning to the same word in different parts of an Act of Parliament or other document is applicable in this case, and that the word "year" in the by-law should be taken to mean "license year," because that is the description of "year" in respect to which under the statute the council is authorized to legislate.

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In my opinion, applying the ordinary and natural meaning of these words, the council has said in this by-law more than the Legislature has authorized it to say, and the license year 1907-8 during which the by-law was passed is necessarily included in the words "in any one year." Unless, therefore, by some rule of law or canon of construction the ordinary and natural meaning of the language of this by-law must be altered or limited in its application, the by-law is clearly void.

Subject to the doctrine laid down in *Kruse v. Johnson*, [1898] 2 Q.B. 91, I am unable to find that in the interpretation of by-laws of municipal councils any different canons of construction have been adopted by Courts of justice from those adopted in interpreting statutes passed by the highest Legislatures. In that case it was broadly stated that in determining the validity of by-laws made by public representative bodies, such as county councils, the Court ought to be slow to hold that a by-law is void for unreasonableness, and that a by-law so made ought to be supported unless it is manifestly partial and unequal in its operation between different classes, or unjust or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it.

As stated by the Lord Chief Justice, at p. 99, "They ought to be, as has been said, 'benevolently' interpreted, and credit ought to be given to those who administer them that they will be reasonably administered. This involves the introduction of no new canon of construction." It will be observed that in this case the by-law was not sought to be invalidated by reason of any excess of legislative authority, but because of the alleged unreasonableness of the by-law in question.

Upon the argument, my brother Riddell directed attention to *Macleod v. The Attorney-General for New South Wales*, [1891] A.C. 455. In that case the Privy Council held that in the statute of the colony of New South Wales which enacted that "Whosoever being married marries another person during the life of the former husband or wife, wheresoever such second marriage takes place, shall be liable to penal servitude for seven years," the legislation must have been intended to apply to those actually within the jurisdiction of the Legislature, and consequently that there was no jurisdiction in the colony to try the appellant for the offence of bigamy alleged to have been committed in the United States of America.

At p. 457 the Lord Chancellor says: "Their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to a colony, and, indeed, inconsistent with the most familiar principles of international law." Then again at p. 458: "The jurisdiction over the crime belongs to the country where the crime is committed, and, except over her own subjects, Her Majesty and the Imperial Legislature have no power whatever. It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that, therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass."

This declaration of law as to the limitation of colonial legislation is in effect the same as the express limitation placed upon the power of municipal councils by sec. 325 of the Municipal Act, which says: "The jurisdiction of every council shall be confined to the municipality which the council represents, except where authority beyond the same is expressly given."

If the proper reading of the by-law in question is that in it the council purports to restrict the issue of licenses for the license year 1907-8, or the unexpired portion thereof, it would clearly be *ultra vires* of the council to pass it for the same reason that in the *Macleod* case it would have been *ultra vires* of the Colonial Legislature to attempt to legislate in reference to crime committed beyond the limits of the colony. The question for consideration therefore resolves itself to this: Does the language of this by-law in its ordinary and natural sense mean that the council attempted to enlarge its jurisdiction beyond that authorized by sec. 20 of the Liquor License Act by embracing within the provisions of the by-law a limitation on the number of licenses to be issued for the license year 1907-8?

In answering this question one must constantly keep in mind the well-settled proposition of law that the powers of a municipal council must be exercised strictly within the limits and in the manner provided by the statute conferring the power: Biggar's Municipal Manual, 11th ed., 331, and cases there cited.

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Where, by the use of clear and unequivocal language capable of only one meaning, anything is enacted by the Legislature, it must be enforced even though it be absurd or mischievous, and if the words go beyond what was probably the intention, effect must nevertheless be given to them. It is the duty of a Court of Justice not to make a statute or by-law reasonable, but to expound it as it stands according to the real sense of the words used: Maxwell on Statutes, 4th ed., pp. 4 and 5, and cases there cited.

"It was most probably an oversight on the part of the Legislature," says Parke, B., in one case, "but we must construe the Act of Parliament according to its obvious meaning": *Nixon v. Phillips* (1852), 7 Ex. 192.

"Our decision," says Lord Tenterden in another case (*Rex v. Barham* (1828), 8 B. & C. 99), "may, perhaps, in this particular case, operate to defeat the object of the Act, but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the Act in order to give effect to what we may suppose to have been the intention of the Legislature."

"I cannot really doubt," said Lord Campbell, in another case (*Coe v. Lawrance* (1853), 1 E. & B. 516), "what the Legislature intended to do, but they have not carried it into effect . . . I regret that, in consequence of the careless and very inaccurate manner in which the clause is drawn, the intention of the Legislature cannot be carried into effect; but it is better that we should adhere to the words they have used, than that we should strive to amend it."

"The Act of Parliament," says Lord Abinger (*The Attorney-General v. Lockwood* (1842), 9 M. & W. 378), "practically has had, I believe, a very pernicious effect—an effect not at all contemplated—but we cannot construe the Act by that result."

"The business of a Judge interpreting a statute is not to improve it but to expound it. The question for him is not what the Legislature meant, but what its language means": Maxwell, 4th ed., p. 7, and cases there cited.

In other words, it is the duty of a Court of law to adjudicate, and not to legislate. In my view it would be necessary, in order to interpret this by-law as contended for by the city, to interpolate either the words "except the license year 1907-8," or the words "beginning on the first day of May, 1908," and in my opinion this

is not such a case where the Court would be justified in making any such interpolation in deciding upon the effect of the by-law.

It is quite immaterial that as a matter of fact the council did not mean to interfere with the powers of the license commissioners for the license year 1907-8, for it is not a question here of what the council meant but what its language means, and it must upon this motion be taken to have meant what it says, and as in my opinion what it says is beyond the authority conferred upon it by statute, this appeal should be dismissed with costs.

RIDDELL, J.:—This is an appeal from the judgment of the Chief Justice of the Common Pleas quashing by-law No. 5040 of the city of Toronto. The facts are set out in the judgment appealed from.

It may at the outset not be entirely without advantage to state the considerations by which, as I conceive, the Court should be governed in dealing with applications to quash by-laws of municipal corporations.

Municipal corporations ("sucking republics" they were called at an early period of their history in Upper Canada) are in the present state of the law an integral part of the constitution of the country; and the governing body of each municipality is a legislative body. The jurisdiction is, indeed, limited, but so is the jurisdiction of the Legislative Assembly of Ontario—and that of the Parliament of Canada. The powers of the council are given by the Legislature, and are not original; but the same remark applies, *mutatis mutandis*, to the higher bodies. No doubt the Legislature might at any time take away any and all powers so denoted, but the Imperial Parliament might do the like with provincial Legislature and Dominion Parliament. Nor is the Court in any higher position. Both Court and municipality are creatures of statute; they derive all their powers from statute, and the same hand which gave may take away. But, in the present state of the law, municipal councils are a part of the legislative machinery of the Province and the governing body of each municipality; every municipal council is a legislative body; the legislative acts of such bodies must be interpreted by the same rules as those of other legislative bodies.

"Municipal corporations, in the exercise of the statutory powers

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conferred upon them to make by-laws, should be confined strictly within the limits of their authority, and all attempts on their part to exceed it should be firmly repelled by the Courts": *per* Osler, J.A., in *Merritt v. The City of Toronto* (1895), 22 A.R. 205, at p. 207. But "the Court ought as far as possible to support by-laws issued by local authorities, unless it could be clearly seen that the by-law was made without jurisdiction or was manifestly unreasonable." It is "undesirable that the Courts should be, so to speak, astute in picking holes in by-laws which dealt with matters which were more familiar to the authorities who framed the by-laws than to the Courts." It is "also safe to lay down this general proposition that, although it is desirable that by-laws should be so free from doubt that 'he who runs may read,' yet as even in the case of higher legislative bodies this" is "not always attained, the Court should strive to so construe" a "by-law as to give reasonable effect to the object aimed at": *per* Lord Russell of Killowen, in *Walker v. Stretton* (1896), 12 Times L.R. 363. By-laws passed by "bodies of a public representative character entrusted by Parliament with delegated authority" are subject to considerations entirely different from those governing by-laws "of railway companies, dock companies, or other like companies, which carry on their business for their own profit, although incidentally for the advantage of the public;" when the by-laws under consideration are those by such a public representative body, clothed with ample authority to do certain acts, and acting or claiming to act under such authority, "the consideration of such by-laws ought to be approached from a different standpoint; they ought to be supported if possible; they ought to be, as has been said, 'benevolently' interpreted": *Kruse v. Johnson*, [1898] 2 Q.B. 91, 14 Times L.R. 416. See also the remarks of Lindley, M.R., in *Thomas v. Sutters*, [1900] 1 Ch. 10, at pp. 14, 15.

The logical result appears to me to be that if the language employed can be fairly interpreted as expressing legislation clearly within the jurisdiction of the council, it should be so interpreted. This is not without authority.

In the case of *Macleod v. Attorney-General for New South Wales*, [1891] A.C. 455, the question arose as to the interpretation to be given to a colonial statute. It is true that the decision did not depend upon the proper construction of such statute, but the remarks

of their Lordships of the Judicial Committee are very important. Their Lordships say, pp. 456, 457: "Their Lordships think it right to add that they are of opinion that if the wider construction had been applied to the statute, and it was supposed that it was intended thereby to comprehend cases so wide as those insisted on at the bar, it would have been beyond the jurisdiction of the colony to enact such a law . . . If that construction were given to the statute, it would follow as a necessary result that the statute was *ultra vires* of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used subject to the well-known and well-considered limitation that they were only legislating for those who were actually within their jurisdiction. . . ."

And in that case their Lordships refused to construe a statute upon the "bare words," as, taking the bare words, the Colonial Legislature exceeded their jurisdiction, and to do so would involve an impossible construction, an attempt on the part of that Legislature to enlarge their jurisdiction to such an extent as would be inconsistent with the powers committed to them.

The result of this case seems to me to be the same as that flowing from *Kruse v. Johnson*. Where an inferior legislative body passes legislation, call it statute, by-law or what you will, and that legislation, from the bare words and construed in the bare words, would be beyond the jurisdiction of the body so legislating, then if another reasonable construction can be placed upon the words used which will bring the legislation within the limits of the jurisdiction of such body, such latter interpretation should be adopted, and the legislation should not be declared *ultra vires* by reason of such wording. Upon my citing this case upon the argument, it was stated by counsel for the respondent that the principle of *Macleod v. The Attorney-General for New South Wales* had been in our Courts declared not applicable to municipal corporations—he has not been able, nor have I, to find the supposed decision. The case was cited by myself upon the question of the interpretation to be put upon a municipal by-law, and consequently upon the question as to whether the by-law should be quashed, in *In re Armour and the Township of Onondago* (1907), 14 O.L.R. 606, but I do not find that it has been elsewhere cited upon that point. It is mentioned upon the question of criminal law involved, by the Queen's Bench

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Division, in *Regina v. Plowman* (1894), 25 O.R. 656, and incidentally by my brother Anglin in *Re Gilhula* (1905), 10 O.L.R. 469, at p. 477. I cannot see on what principle the rule should not be held to apply to the legislation of a municipal council as to that of any other inferior legislative body.

And in *Walker v. Stretton*, 12 Times I.R. 363, the decision indicates the rule. There the by-law provided that a person driving or having charge of a vehicle during certain hours should carry a lighted lamp attached to such vehicle. It was argued that the by-law was unreasonable because it was not restricted to vehicles upon highways. The L.C.J., with whom Wright, J., agreed, "thought it was possible to read the by-law as applying only to persons driving in public places, and that being the proper construction the by-law was not too wide." See also *Regina v. Saddlers' Co.* (1862), 32 L.J.Q.B. 337, in which Lord Wensleydale lays down the following canon, p. 360: "As in one sense of the word a by-law is good and in the other not, the rule is that it ought to be construed so as to make it valid, and not to defeat it."

With one further remark we may approach the concrete case now before us, and that is that a by-law if validly made has the force of law within the sphere of its legitimate operation—*Kruse v. Johnson* (1898), 2 Q.B. 91, at p. 96—and while transgression of the limits of the jurisdiction given to the inferior Legislature must be jealously watched and repressed, yet if the subject matter of the legislation be within such limits, the Court should not at all play the part of a capricious benefactor to any class of the community—any more than it should act the *deus ex machinâ* to destroy a situation which for any reason is or has become distasteful to any person or class of persons.

In our little republics, every alderman is responsible to his constituents, who will deal with him according to their good will and pleasure. The people must in the long run have their way, and it is no part of the duty of the Court to interfere with the policy of the people or their representatives.

The by-law in question was made under the provisions of sec. 20 of the R.S.O. 1897, ch. 245, which provides as follows: [setting it out]. And it consists of one section which is in these words: [setting it out].*

* See *supra*, pp. 500-1.

It will be necessary, then, to examine by-law No. 4311, passed as it was February 22nd, 1904. At that time, as now, the number of liquor licenses was limited by statute; the license year began on the 1st May of each calendar year and lasted till and including the 30th April of the next. All licenses, at whatever date issued, terminated upon the 30th April. The license commissioners met at some time before the 1st May to limit the number of licenses to be issued within the year from the 1st May till the succeeding 30th April: sec. 4 (2); the licenses were issued as of the 1st May: sec. 8 (1); and either on or before the 1st May or between the 1st and the 15th May: sec. 8 (2); with power given to the commissioners, where special circumstances were shewn, to issue one or more licenses at any time after the 1st May if within the number authorized by the Act, provided a proper petition had been filed on or before the 1st April preceding that 1st May: sec. 8 (3). The result was that the commissioners fixed, at their meeting before the first of May in each calendar year, the number of licenses which should be issued as of the 1st May then succeeding. If this were the whole number allowed by the Act, no further licenses could be issued for that approaching license year; but if they fixed a number less than the number allowed by the Act, then as to the balance they might, certain conditions being fulfilled, issue them at any time before the next succeeding 1st of May. If the number permitted were, say 150, and the commissioners decided upon the issue of 120, leaving a reserve of 30, it might be that the whole 30 would be issued after the 1st of January succeeding the 1st May—these coming to an end on the following 30th April. It might happen that the policy of the commissioners changing, and they determining to issue at once the whole 150, in the one calendar year a total number of 30 plus 150, equals 180, might be lawfully issued, though the limit given in the statute for the number to be issued “in each year”—sec. 18 (1)—was only 150. Moreover, in the license year, 150 being the limit, any number of licenses from 0 to 300 might be issued without a violation of the statute. For example, 150 might be issued on the 1st May, 1905; 150 on the 30th of April, 1906, as of the 1st May, 1906, and 150 on the 1st of May, 1907. In the license year beginning 1st May, 1905, 300 are validly issued; in the next, none.

Then the municipal council is given the powers conferred by

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sec. 20. No municipal council has the power at any time, except in the months of January and February, to interfere with the number of licenses at all. Coming fresh from a popular election, the new aldermen are supposed to know the desires of the people, and they are given the power at any time during the first two months of the year to reduce the number of licenses to be issued for the then ensuing license year. They have no more power to interfere with the licenses issued or to be issued for the current license year, or with the number thereof, than their predecessors in the former council or the council of another city or town; and it makes no difference whether half, or less, or more than half, of the number authorized for the then current license year should be in reserve, and in the power of the board to issue at any time before the approaching 1st May. It must be apparent that any by-law passed under sec. 20 cannot have any purpose in view other than the limiting of the number of licenses for the next license year and the succeeding license years. If the critical day—the 1st of March—is allowed to arrive without such a by-law being passed, that council has lost its opportunity, and not till the people have again declared their choice and a new set of aldermen is elected does the opportunity occur again. If a by-law limiting the number be passed—and as has been said if passed at all it must be in January or February—then (at least on and after the 1st March) there can be no change. *Jacta est alea.*

In that state of the law, by-law No. 4311 was passed in February, 1904. The whole by-law is set out by the learned Chief Justice in his judgment; it is necessary to refer to only secs. 1 and 2: [setting them out].

Applying to the consideration of these sections the principles I have set out, it is plain that a reasonable interpretation can be given to them which will bring them certainly within the jurisdiction of the municipal council. If we consider the first section, the phrase “in every succeeding year” being read to mean “for each succeeding license year,” and the second, the phrase “in any one year” being read to mean “for any license year,” it is apparent that the whole legislation in question is within the powers of the municipality. The sections may be so read, and consequently should be so read, and if so read admittedly the amendment is *intra vires* and valid. But apart from any reference to the principle

of *Macleod v. Attorney-General*, I think the same result must follow.

Admittedly the whole object of the amending by-law was to reduce the number of licenses which could be granted for the license year beginning May 1st, 1908, to 110, and so for succeeding license years. Counsel for the respondent repudiated all thought that the council had any intention or desire to interfere in any way with the license year ending 30th April, 1908. In like manner the original by-law was not intended to interfere with the license year ending 30th April, 1904. The whole question is whether the council have expressed their intention.

"The words of a statute are to be understood in the sense in which they best harmonize with the subject of the enactment and the object which the Legislature has in view. Their meaning is found not so much in a strictly grammatical or etymological propriety of language, nor even in its popular use, as in the subject or in the occasion on which they are used, and the object to be attained": Maxwell on Statutes, 4th ed., p. 78. The learned author gives a number of examples illustrating and fully justifying his statement of the law. "The literal construction has . . . in general but *primâ facie* preference. To arrive at the real meaning, it is always necessary to get an exact conception of the aim, scope and object of the whole Act; to consider . . . (1) what was the law before the Act was passed, (2) what was the mischief or defect for which the law had not provided . . ." According to another authority, "the true meaning of any passage is to be found not merely in the words of that passage, but in comparing it with every other part of the law, ascertaining also what were the circumstances with reference to which the words were used, and what was the object appearing from these circumstances. . . . Every clause of a statute should be construed with reference to the context and the other clauses of the Act, so as so far as possible to make a consistent enactment of the whole statute."

The council passed the original by-law under a statute which—sec. 4 (2)—provides that the commissioners may meet at any time before the 1st May in each year amongst other things "for limiting the number of tavern . . . licenses . . . and the persons to whom such limited number may be issued *within* the year, from the 1st May to the 30th April." Section 8 (1): The licenses are

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dated as of the 1st May and expire on the 30th April following such 1st May and—sec. 8 (2)—after the 1st May may issue between the 1st May and the 15th May. Section 18 (1): “The number of tavern licenses to be granted . . . *in* each year is not to be in excess of” a certain number, and in no case to exceed the number issued “*for* the year ending 1st May, 1897, until it appears” that the population has increased, with certain provisions—sec. 18 (2)—for a reduction not taking effect “for the license year commencing 1st May, 1898,” and—sec. 18 (3)—in case of repeal providing for the number of tavern licenses which may be issued “in the year following” such repeal. Section 20 (1): The council “may by by-law . . . limit the number . . . to be issued . . . for the then ensuing license year . . . or for any future license year.” Section 21 gives authority to the commissioners to extend a license, but this does not authorize the board “to exceed the limit . . . as to the number . . . to be granted . . . in any year . . .” Section 30 (2) provides for saloon licenses “for the license year commencing the 1st May, 1898,” while sec. 32 (1) gives power to the council to “limit the number of shop licenses to be granted therein *for* the then ensuing license year,” and such by-law—sec. 32 (2)—“shall remain in force for any future year until repealed.”

I think it is plain that the Legislature have used the expressions “within the year,” “in each year,” “for the license year,” “in the year,” as synonymous. The council in framing the original by-law may well have had before them the terminology employed by the Legislature, and adopted the wording of secs. 18 (1), 21, to express their meaning. In view of the object and subject matter of the by-law, I am of opinion that the language does express the meaning of the council. If not, and if the language is inapt, the council is no worse than other and more ancient, noted and powerful bodies. Cases are not unknown in which even Parliaments have passed legislation which not only did not express the meaning of Parliament but did not express any meaning at all. And, not to enter the realm of generalities, a reference to sec. 3 of this very Act gives an illustration of the misuse of language: “Each of” the commissioners “shall cease to hold office on the 31st day of December in each year or until a new board or a majority thereof has been appointed.” The result would be very curious if each commissioner should cease

to hold office until the appointment of a new board. That is, however, by the way.

Can there be any doubt as to the meaning of "in every succeeding year" in sec. 1, or of "in any one year" in sec. 2, of the by-law? The by-law, like the statute, had been speaking of the license year—a year, that is, which begins on the 1st May of one calendar year, and ends on the 30th April of the next. This is literally "a year." A year is the period of the earth's revolution around the sun, "the time wherein the sun goes around his compass through the 12 signs, viz., 365 days and about 6 hours." Etymologically the idea of the spring seems to be involved, and therefore it is said that the word "more accurately" means "the interval between one vernal equinox and the next." But however that may be, the literal meaning is the period of one revolution of the earth around the sun. In such a highly metaphorical language as ours it was to be expected that the word would be used in many senses and with many meanings. What the senses and the meanings are will generally depend upon the context and the matter under discussion. In the present case I cannot see that it is at all doubtful what the council meant by the word "year" or by the phrase "in any one year." And this conclusion I would arrive at even if sec. 2 of the by-law were all that could be looked at.

I do not think that the case of *Spencer v. Metropolitan Board of Works* (1882), 22 Ch.D. 142, prevents our looking at the remainder of the by-law. Jessel, M.R., at p. 162, indeed says: "The first observation to be made on sec. 33 is that we ought to find out its meaning if we can from the section itself. If we can do that we need not have recourse to the use of the word "take" in the other sections of the Act. If we cannot, then I agree . . . that as a general rule a word is to be considered as used throughout an Act of Parliament in the same sense, and therefore we may look through the other sections to see in what sense the word is there used." Grant all that—the learned M.R. does not say or suggest that we may not look at the rest of the Act to see the object and purpose of the Act; but without saying anything contrary to the general rules of interpretation of statutes, some of which I have referred to, he suggests that when once one has "the natural meaning of the words" in any section, these words must be construed in that way unless we find something in the other parts of the Act to

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authorize a different interpretation: see p. 163. The M.R. himself considers the meaning of the word in the section in two senses, and arrives at a meaning which I venture to think is far from the etymological, literal or *primâ facie* meaning, namely, "acquire a complete title." So here there are two meanings to the expression "in any one year," viz., "during the course of any one calendar year," and "for any one license year," and I do not find anything in the case cited which prevents us determining that the latter is the true meaning in view of the subject and object of the legislation. And *a fortiori* there is no decision that only the *primâ facie* meaning of the words should be adopted if that would make sense—even if "in any one year" means here *primâ facie* "in any one calendar year," as it undoubtedly does in some cases.

The illustration suggested upon the argument, homely as it is, may perhaps be used. Suppose a statute granting a bonus of one dollar for every pig produced—no definition of "pig" appearing in the section—would a farmer be entitled to a bonus for every addition to his herd of swine for the reason that the word "pig" means *primâ facie* a hog? Could we not look at the object of the legislation, and if we found that the legislation was about the production of pig-iron, could we not use that knowledge in interpreting the word in the separate section?

The objection that the amendment would prevent the issue of the 6 licenses still in the power of the commissioners unissued, has, I think, been met by implication in what has been said. It involves, I think, a strained interpretation of the phrase "in any one year," as meaning "in the course of one year." The meaning "in the course of one calendar year" cannot be given to the phrase—if that were so then (no change being made in the original by-law) the issue by the commissioners of the 6 reserve licenses before the 1st May, 1908, and of 150 on or about the 1st May, 1908, would be a violation of the original by-law, and no one pretends that to be the case.

It cannot be the license year beginning the 1st May, 1907; the council have no power at all over the number for that license year; the by-law can only refer to succeeding years—years over which the council has control. As well might it be considered that a by-law of the city of Toronto providing for the supervision of "all parks" should be held invalid because the city of Toronto had

no control over Dundurn Park in Hamilton—and that park would come within the words “all parks.”

The question may be tested in this way: Suppose the by-law and amendment were undoubtedly valid, and suppose the commissioners, after the passing of the by-law, were to issue the reserve licenses; would they be held to have violated the amended by-law? Would it not be held that the object and intention of the legislation were perfectly plain, that it was obvious that there was no intention to interfere with the discretion of the commissioners in respect of the reserve licenses; and that only the future license years were in the contemplation of the Legislature? I cannot understand a Court deciding in any but the one way.

I am of opinion that the council have succeeded in passing a by-law which properly carries out their intention, and that we should not interfere. The appeal should be allowed and the motion to quash dismissed with costs in this Court and before the Chief Justice.

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REX V. MCGUIRE.

Criminal Law—Master and Servant—Mining Company—Inciting Strike—Industrial Disputes Investigation Act, 1907—Construction of Statute—Excessive Penalty—Amendment—Criminal Code, sec. 1124—Powers of Court Under—Costs.

The Industrial Disputes Investigation Act, 1907, 6-7 Edw. VII. ch. 20 (D.), provides for a reference, in certain cases, of disputes between employers and employees to boards of conciliation and investigation; by sec. 56 prohibits strikes or lock-outs "prior to or during" such a reference; and by sec. 60 declares that "any person who incites . . . any employee to go or continue on strike contrary to the provisions" of the Act shall be guilty of an offence and liable to a fine. The defendant was convicted under the above sec. 60 of unlawfully inciting the employees of a mining company to go on strike, and adjudged to pay a fine of \$500, and in default thereof to be imprisoned for six months. At the time when the alleged offence was committed, neither the mine-owners nor their employees had made application for the appointment of a board under the Act:—

Held, that the prohibition by the statute of strikes or lockouts "prior to or during a reference" of the dispute to a board does not apply only to cases in which one of the parties to the dispute has made application for the appointment of such a board, but makes all strikes and lockouts illegal until there has been such a reference, and the board has made its report thereon. A strike is therefore "contrary to the provisions of the Act," before as well as after it has been invoked by either the employers or employees, and, as there was evidence to support the conviction, it must be affirmed.

As, however, the penalty of six months' imprisonment, in default of payment of the fine, was in excess of that which the magistrate had power to impose, it was reduced to three months, being the maximum term under part XV. of the Criminal Code, which, by sec. 61 of the Act, governs the procedure for enforcing penalties imposed thereunder, and the conviction was amended accordingly, without costs.

THIS was a motion to quash the conviction of one James McGuire, made by the police magistrate of the town of Cobalt, on a charge of "having unlawfully incited the employees of the Nipissing Mining Company to go on strike."

The motion was argued on the 16th and 17th of January, 1908, before a Divisional Court composed of MULOCK, C.J. Ex.D., MAGEE and CLUTE, JJ.

E. E. A. DuVernet, K.C., for the defendant. (1) The acts complained of constitute no offence at common law, and can only be made such under the provisions of the Act. That being the case, there could be no offence under the Act, as no application had been made by either party so as to bring it into operation. If a common law right has been taken away, and a new offence created by statute, this should be made perfectly clear, and the benefit of any

doubt given to the accused: *Hardcastle's Statute Law*, 3rd ed., pp. 130, 454; *Regina v. Rose* (1896), 27 O.R. 195, at p. 197; *Railton v. Wood* (1890), 15 App. Cas. 363, at p. 366; *Cox v. Hakes* (1890), 15 App. Cas. 506, at pp. 517, 529; *Robertson v. Day* (1879), 5 App. Cas. 63, at p. 68; *Hill v. East and West India Dock Co.* (1884), 448, at pp. 453, 454; *Edinburgh Street Tramways Co. v. Lord Provost, etc., of Edinburgh*, [1894] A.C. 456, at p. 465; *Lang v. Kerr* (1878), 3 App. Cas. 529. (2) The conviction and information are bad on their face. The offence should be clearly defined, and it must be shewn what has occurred to make it an offence: Criminal Code, sec. 717; *Rex v. Boomer* (1907), 15 O.L.R. 321; *Regina v. Smith* (1899), 31 O.R. 224; *Rex v. James*, [1902] 1 K.B. 540; *Smith v. Moody*, [1903] 1 K.B. 56; cases discussed in *Stone's Justice's Manual* for 1907, p. 834. (3) The alternative penalty of six months' imprisonment imposed by the magistrate was in excess of that which could be legally imposed under sec. 61 of the Act: see sec. 739 of the Criminal Code, under which only three months' imprisonment can be given.

J. R. Cartwright, K.C., deputy attorney-general, for the Crown. The construction contended for by defendant's counsel is contrary to the plain meaning of the words of the 56th section of the Act, and would tend to defeat its express object, as if such construction were maintained, parties would be more precipitate in striking or locking out. The title of the statute confirms the contention of the Crown, and may be looked at: *Maxwell on Statutes*, 4th ed., p. 61. As to the technical objections urged on behalf of the defendant, the conviction, if found defective in form, should be amended: *Rex v. Meikleham* (1905), 11 O.L.R. 366.

J. Lorne McDougall followed on the same side, referring to sec. 2, sub-sec. (g), and sec. 63, sub-sec. 3, of the Act.

DuVernet, in reply, referred to *The King v. Audley* (1906), 23 Times L.R. 211.

February 12. CLUTE, J.:—Rule *nisi* to quash a conviction made by the police magistrate of the town of Cobalt whereby James McGuire was convicted, "for that he did unlawfully incite the employees of the Nipissing Mining Company, Limited, to go on strike, on the 2nd day of July, A.D. 1907, and said magistrate did adjudge the said James McGuire for his said offence to forfeit and

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pay the sum of five hundred dollars, and in default of immediate payment of the said sum, to be imprisoned in the common gaol at North Bay."

The principal objection argued was that the magistrate had no jurisdiction to try the case under the Industrial Disputes Investigation Act of 1907, as the Act was not invoked by either the mine owners or the workmen, and was not, therefore, in force at the time when the said offence was alleged to be committed.

The conviction was made, as appears from the proceedings before the magistrate, under sec. 60 of the said Act, which is as follows: "Any person who incites, encourages or aids in any manner any employer to declare or continue a lockout, or any employee to go, or continue on strike, *contrary to the provisions of this Act*, shall be guilty of an offence, and liable to a fine of not less than \$50 nor more than \$1,000."

When is a strike contrary to the provisions of the Act? Mr. DuVernet says only after the Act has been invoked by either the employer or employees, and that is the question involved in this appeal.

"Dispute" is defined by sec. 2, sub-sec. (e), to mean any dispute or difference between an employer and one or more of his employees, as to matters or things affecting or relating to work done or to be done by him or them, etc., and includes all matters relating to wages, the hours of employment, etc.

The definition is not limited to a dispute where the Act has already been invoked.

"Strike," by sub-sec. (g) of sec. 2 (without limiting the nature of its meaning), means the cessation of work by a body of employees acting in combination . . . in consequence of a dispute, done as a means of compelling their employer . . . to accept terms of employment. Section 5 provides for a reference of disputes to boards of conciliation and investigation. Section 56 declares that "it shall be unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute *prior to* or during a reference of such dispute to a board of conciliation," etc.

The evidence was clear that the defendant did incite the employees of the mine to go on strike, on account of a dispute within the meaning of sec. 2, sub-sec. (e). The fact that the dispute was

prior to a reference of such dispute to a board of conciliation is expressly provided for by sec. 56, and is thereby declared to be unlawful.

I think the meaning of the statute to be that in the class of cases to which it applies there shall be no lockout or strike, on account of any dispute as therein defined either prior to or during a reference, under the Act. I think the Act applies, and that there was evidence to support the conviction.

The information is in the words of the statute, and is, I think, sufficient. The conviction follows the information.

That part of the conviction, however, imposing six months' imprisonment in default of payment of the penalty imposed, is in excess of that which could be lawfully imposed. Section 61 provides that the procedure for enforcing penalties imposed by the Act shall be that prescribed by part XV. of the Criminal Code relating to summary convictions. Turning to part XV., sec. 739, sub-sec. (b), the imprisonment in default of payment of the penalty is for any period not exceeding three months.

I am satisfied that an offence of the nature described in the conviction was committed, but that the imprisonment imposed for default of payment of the penalty ought not to have exceeded three months.

Section 1124 declares that the Court shall have the like powers in all respects to deal with the case as seems just, as are, by sec. 754 of the Code, conferred upon the Court to which an appeal is taken under sec. 749 of the Code.

Where an appeal is taken under sec. 749, it is provided by sec. 754, that notwithstanding that the punishment imposed may be in excess of that which might lawfully have been imposed or made, the Court may modify the decision of such justice, or may make such other order or conviction as the Court thinks best. Under these sections of the Act, the conviction should be amended by reducing the term of imprisonment for default of payment of the penalty imposed from six to three months, and in other respects the appeal should be dismissed, and as it was necessary that the defendant should move in order that the sentence might be reduced, there should be no costs.

MULOCK, C.J.:—I agree.

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MAGEE, J.:—The conviction which it is sought to quash states the offence to be that of "having unlawfully incited the employees of the Nipissing Mining Company to go on strike." No reference is made in it to any statute, and it is conceded that unless it is warranted by the "Industrial Disputes Investigation Act, 1907," there is no authority for it.

Section 60 of that Act declares that any one who incites any employee to go or continue on strike contrary to the provisions of the Act is guilty of an offence and liable to a fine. Then, to find what is meant by going on strike contrary to the Act we turn (in this case) to sec. 56, which makes it unlawful for any employer to declare or cause a lockout, or for any employee to go on strike, on account of any dispute, prior to or during a reference of such dispute to a board of conciliation and investigation under the provisions of the Act. For the meaning of these words, "employer," "employee," "dispute," "lockout," and "strike," we must turn to sec. 2.

Except in the single case of an agreement mentioned in sec. 63, that Act is limited in its operation to certain specified industries. In case of dispute between an employer and one or more of his employees, which they are unable to adjust, the Act (secs. 5 and 21) provides that either party may make application to the Minister of Labor for the appointment of a board to which the dispute may be referred. It becomes the duty of such board (sec. 23) to endeavour to bring about a settlement, and to that end make inquiries and suggestions. If the parties agree to a settlement (sec. 24), or agree to be bound by the board's recommendation (sec. 62), then such settlement or recommendation may be made a rule of Court with whatever effect that may have. But if the parties do not do either, then the board has no compulsory powers, and can only report (under sec. 25) the result of their investigation and efforts, with their suggestions and recommendations, to the Minister, who makes it public (under sec. 29). Thereafter the parties are left to public opinion and their own good sense or obstinacy, and the Act declares (in sec. 56) that nothing therein shall be held to restrain a lockout or strike in respect of any dispute which has been duly referred to a board and dealt with under secs. 24 or 25, that is, by agreement of settlement, or by a report.

As it is going "on strike contrary to the Act" which under sec. 60

must not be incited, it is argued for the defendant that if the strike would not be contrary to the Act that section could not apply. It is therefore upon sec. 56 that the broadest question raised in this case turns in order to see if the strike is within it. It is said that in other pending cases the same point is involved. For the defendant it is urged that although strikes are prohibited thereby prior to or during a reference, that only means, provided either party has asked a reference, and that this restrictive provision of the Act is only intended to take effect if the machinery of the Act is going to be used. On the other side, it is said that Parliament manifestly intended that in these particular industries conciliative and investigating machinery must be used before the extreme and disturbing expedient of a lockout or strike can be resorted to by either party. Leaving aside the possibility, even under the defendant's contention, of a man before an application or a reference inciting to a strike to be made after and in spite of either, let us look at the meaning of sec. 56. It is not of moment to consider at what exact stage from the Minister's decision to establish a board down to their first meeting a reference may be said to begin. Prior to that stage there must not in these industries be a lockout or strike "on account of a dispute." That seems plain enough, and to contemplate one and only one whole period of prohibition, extending from the dispute to the reference, and to provide for peace during that interval. According to the argument for the defendant that must be divided into two periods—one between the dispute and the application and the other between the application and the reference. I find nothing in the Act requiring or authorizing such a construction. If it be asked how can anything be said to be prior to something which never occurs, the answer is that the party himself can make it occur, and until he or someone does, his conduct is controlled.

It is true that sec. 56, even as interpreted by sec. 2, cannot be taken literally. It would so taken prevent a strike where fewer than ten employees are affected by a dispute. But as sec. 21 declares there cannot be a reference in such a case, it is manifest the prohibition before a reference cannot be intended.

It is true also that prohibition of a strike before an application might seem to be an undue interference with personal rights in some cases. The Act does not declare all strikes to be illegal. On

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the contrary, it recognizes without reprobating their possibility, requires proof (sec. 15) that "the necessary authority" to declare one has been obtained before application for a reference, declares (sec. 56) that it does not prevent them as a last resort, and imposes a penalty (sec. 57) if the employer seeks under cover of its provisions delay which would postpone that ultimate right. Section 590 of the Criminal Code also prevents prosecution for conspiracy in refusing to work. And yet in the case of an employer reducing wages and the men desiring to cease work, and the employer being ready to get others to take their places, and neither party wishing to invoke the Act, a strike would be prevented if sec. 56 applied, and the men would be driven to make application for a reference although they were not the parties disturbing the *status quo*, and although the Act (sec. 5) only purports to be permissive in allowing the application. Whether, in view of the definition of "strike," in sec. 2, as being "done as a means of compelling their employer to accept terms of employment," although its meaning is not limited, sec. 56 would in such a case apply, and whether refusing to work on new terms not accepted would be a strike, are other questions. But at least the words of the section are broad enough not to make a distinction between the period preceding and that after the application. Then, too, under sec. 16 an application for a reference, if the men are all members of a trade union, must be signed by two officers of the union duly authorized by a majority vote at a meeting called for that purpose. If the employees interested cannot persuade a majority, perhaps not interested though obstinate, to make an application, what are they to do? Are they to be deprived of a reference and yet compelled to work on indefinitely on terms unsatisfactory to them and from which there is no promise of relief? The construction asked by the defendant would obviate such a difficulty by making the application or notice of it the commencement of the restraint. Such a case may be unprovided for, and if it should arise a solution would doubtless be found outside of legal construction. Discontinuance of work is not necessarily a strike, and membership in a union need not continue. The legislation is tentative, broad and beneficial, and it cannot be expected to cover at once all the little difficulties which may be imagined to arise. No doubt, where legislation is passed to obviate or remedy some

particular evil, or bring about some particular result, courts have so construed the words of the enactment as to limit them to the purpose intended, although those words, read literally as they stand, might have a wider effect, and if allowed to apply beyond the intent bring about results not contemplated and unjust. But here the question is, can it be said that the intent was to limit the sanctions of the Act to a period depending upon the will of one party to the dispute? There is nothing in the Act to shew that it is out of regard for the rights of the workmen that the employer is restrained from a lockout, or out of regard from the rights of the latter that the former are restrained from a strike. Neither may have broken any contract, and there may be no question of civil rights between them. Why, then, should the lawful conduct of either be restrained at the will of the other, and only during the time that will is operative? We must look deeper to find the purpose of the Legislature before we can say their words should be limited to that purpose.

The prohibition in sec. 60 against inciting to "continue" on strike, which might seem to contemplate an existing one, is accounted for in sec. 63, which directs a strike in other industries to cease upon notification of the Minister's decision to refer. The title of the Act which was sought to be invoked against the defendant sheds no light, for it refers to "settlement" as well as "prevention," and in any view the Act attempts both.

I find nothing in the Act to shew that even the possibility of a strike in these industries before an application for reference was considered. On the other hand, an application before a strike is manifestly contemplated in sec. 15, which requires the application to be accompanied by proof that a strike will be declared. In the industries to which the Act applies the prohibition is against going on strike; in the others (sec. 63) the strike is to cease. To give time for reference and adjustment, sec. 57 requires thirty days' notice of any change affecting conditions of employment, and although that section is only levelled against disturbance during the reference, the words used are significant—"the relationship of employer and employee shall continue uninterrupted by the dispute."

But outside of all this, the limited class of industries to which the Act applies affords the strongest indication of the purpose of

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Parliament and the strongest reason why there should be no interruption of the work. They are "mining properties" and "agencies" "of public service utility." As regards the latter, upon which the community depends for daily and constant necessary service, the public interest in and need for their unbroken operation is manifest, and in the case of railways Parliament set forth some of the evils resulting from lockouts and strikes in the preamble to the Railway Labour Disputes Act, 1903. The Criminal Code had previously made mere breaches of contract in the case of railways and other utilities criminal offences when to the public detriment. As regards coal mines, apart from danger to the peace, the loss and privation which may result to manufacturers and consumers at large through wide sections from a general interruption of production is matter of recent history and common knowledge. Parliament has seen fit, doubtless for good reasons, some of which readily occur to one, to include silver and other mines in the same category in this Act, and they cannot be separated in interpreting it.

The right of temporary interference with private liberty of action by the prohibition of lockouts and strikes during the period of actual investigation as justified by the interest of the community being asserted by Parliament, there would be the less reason for non-interference before such investigation with a strike which, while it might be disastrous, could only be short-lived, inasmuch as it could be so soon ended by the opposite party invoking the aid of the Act. In so far as the public interest is concerned in any restriction, it justifies even more the temporary prohibition *ab initio* than a mere interruption of the strife. The policy of the Act therefore does not assist, but equally with its terms is opposed to the defendant's contention.

To come, then, to this particular conviction, as already mentioned, it makes no reference to the Act. It is impossible to gather from it that the defendant has been guilty of any offence. Under some circumstances it is by this Act made unlawful to incite some employees of some employers to go on strike, but not all employees nor under all circumstances. Outside of this Act, even where it may be unlawful in the sense of being actionable, it might not be a criminal offence, or even if a criminal offence it might not be the subject of summary conviction.

There is nothing in this conviction to shew that the Nipissing

Mining Company is such an employer as the Act applies to, nor that its employees who were incited were such as there referred to, nor that the strike was to be, as required by sec. 56, "on account of a dispute," and that such a dispute as the Act refers to, nor that the strike incited was to be "prior to or during a reference."

All these are essential matters necessary to be proved in order to constitute the offence. None of them are matters of qualification, exception or proviso as to which questions might be raised upon whom the onus of assertion or proof would lie. Yet upon all of them the conviction is silent.

I am leaving out of consideration any special meaning of the words "go on strike," and assuming that the Act does not limit the ordinary use of them to which the object of enforcing compliance with demands or redress of grievances seems to be attached.

It was argued that as the conviction states that the defendant "unlawfully" incited, that must mean that the strike would be unlawful, and therefore contrary to the Act, but such an effect cannot be given to it. There might be lawful or unlawful means, or unlawful but not criminal means, used to incite to do a lawful or non-criminal act: see *Rex v. Goodfellow* (1906), 11 O.L.R. 359; and see Paley on Convictions, 8th ed., pp. 196 and 200, as to the use of the word "unlawfully" being insufficient to make up for the absence of the allegations to shew that the act is unlawful.

The information stated the charge in the same way as the conviction does, but had the added words, "against the form of the statute in such case made and provided." These words were in all probability inserted and intended to refer, as they usually do, to the offence charged against the defendant—that is, to the incitement, and not to that which the employee was incited to. But they would not as to the incitement supply the circumstances necessary to make it an offence: *Rex v. James*, [1902] 1 K.B. 540; 2 Hale, Pleas of the Crown, 170; Paley, 8th ed., 196; *Ex parte Hopkins* (1891), 66 L.T.N.S. 53; *Rex v. Jukes* (1800), 8 T.R. 536. But as they stand the prosecution would be entitled to the benefit of the argument that they immediately follow the words "to go on strike," and therefore should be taken to refer to them. At the hearing before the police magistrate, before any evidence was taken, this construction was claimed in answer to the objection of defendant's counsel, so that the defendant had notice that it was

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intended thereby to charge that the strike which he incited was contrary to the Act. I do not think that carries the matter any further against the defendant, for it should still have shewn in what way the strike incited would be contrary to the Act, but at least it comes nearer stating his offence in the words of the statute creating it, and he was not misled in fact upon his trial.

The word "employees," used in both the information and conviction, has in secs. 56 and 60 of the Act a precise and limited meaning given to it, as perhaps the word "strike" has not under sec. 2. This limited meaning of "employees" carries with it throughout the Act the nature of the work and of the employer's business and the number of his employees. But though its use in the Act itself carries that precise meaning with it, the Act does not give the word that precise meaning in other documents, or warrant its being taken in other than the ordinary acceptation. There might well be employees, such as civil engineers or mining experts, not doing either clerical or manual work, and therefore not within either sec. 56 or sec. 60.

Even if we could apply sec. 723 of the Criminal Code, which declares that the description of any offence in the words of the Act creating the offence, or any similar words, shall be sufficient, this conviction does not do that, for it omits the essential assertion that the strike incited was contrary to the Act.

The conviction, therefore, on its face is bad, for not stating any offence. It cannot be said that what it alleges could not be an offence, but it might or might not be, and therefore it cannot be said that the defendant was convicted of one.

It was also objected to it that the Act did not authorize a summary conviction with imprisonment as a result of non-payment of the penalty, and that sec. 61 merely directed that the procedure for enforcing the penalty should be that prescribed by part XV. of the Criminal Code relating to summary convictions. Section 60 does not merely impose a penalty, but declares the inciting to be an offence, and the Interpretation Act, sec. 28, declares that every Act shall be read as if an offence punishable on summary conviction were referred to as an offence and the Criminal Code shall apply. This objection cannot be given effect to.

The conviction imposes a fine of \$500, and in default of payment imprisonment for six months. It was conceded by the deputy

attorney general that this term of imprisonment was unauthorized, and should not be more than three months, under sec. 739 of the Criminal Code.

The conviction thus being invalid in two respects as it stands, what should be done with it? Section 65 of the Industrial Disputes Investigation Act, 1907, only cures defects of form or technical irregularity, even if this could be said to be a proceeding under the Act. The Criminal Code, however, in sec. 723 provides that no information or conviction under part XV. shall be deemed insufficient for not naming or describing with precision any person or thing, and in sec. 724, that no objection shall be allowed to any information for any alleged defect therein in substance or in form, and by sec. 1124 no conviction shall be held invalid for any irregularity, informality, or insufficiency therein if the Court upon perusal of the depositions is satisfied that an offence of the nature described in the conviction has been committed over which the justice had jurisdiction, and that the punishment is not in excess of that which might be lawfully imposed, and even if the punishment be in excess the Court has the like powers as under sec. 754 might be exercised by a Court on an appeal from the conviction. Under sec. 1125 the generality of this curative provision is not restricted, but is to include *inter alia* the omission to negative circumstances which would make the act complained of lawful. When we turn to sec. 754 we find that the Court to which an appeal is brought is enabled, notwithstanding any defect in the conviction, and notwithstanding that the punishment is in excess of what is lawful, to hear and determine the charge upon the merits, and to modify the decision of the justice, and make such other conviction or order as the Court thinks just, and may by such order exercise any powers which the justice might have exercised.

Now, if under sec. 1124 we turn to the depositions, it was conceded before us that there was sufficient evidence to warrant a conviction under sec. 60 of the Act of 1907 if there could be a conviction under sec. 56 for a strike before an application for a reference—it being admitted on the depositions that there was no such application. That being so, should the amendment be made as regards the statement of the offence and the punishment? In *Rex v. Hayes* (1903), 5 O.L.R. 198, where the conviction did not allege, as was necessary, that the defendant “knowingly” did what he was charged

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with, the Court considered that was not an irregularity, informality, or insufficiency, within sec. 1124 (then sec. 889 of the Criminal Code of 1892) which could be amended, but in that case the depositions did not warrant the amendment and so the conviction was quashed. In *Rex v. Boomer*, 15 O.L.R. 321; *Regina v. Crandall* (1896), 27 O.R. 63; *Regina v. Smith* (1899), 31 O.R. 224, and in other cases, the absence of evidence also prevented the necessity of deciding as to amending. In *Rex v. Meikleham*, 11 O.L.R. 366, an amendment was allowed in the statement of the offence in the conviction, the defendant having admitted facts making him guilty of the offence as amended. In that case the conviction as it stood did not necessarily charge an offence. Neither does this conviction. That was the decision of a Divisional Court. The allegations omitted from this conviction are quite as essential as the *scienter* in *Rex v. Hayes*, which was also before a Divisional Court, but as the conviction in the latter case failed also upon the evidence, I think *Rex v. Meikleham* should be followed, and the conviction be amended, both as to the statement of offence and the term of imprisonment, which should be reduced to three months.

As the conviction was defective, there should be no costs.

G. G.

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Feb. 15.

Master and Servant—Workmen's Compensation for Injuries Act—Notice of Injury Given too Late—Notice by Defendant as to—"Hearing of the Action"—When said to Begin—R.S.O., ch. 160, secs. 9 and 14

In an action under the Workmen's Compensation for Injuries Act (R.S.O., 1897, ch. 160), the notice of the injury required by sec. 9 of the Act was given ten days too late, and the want of notice was pleaded by the defendant. The case first came up for trial on 23rd January, 1908, when it was put at the foot of the list, by direction of the Court, and on the same day the defendant served notice, under sec. 14 of the Act, that he intended to rely for a defence on the want of notice. The case came on again for hearing in due course on 27th January, when it was again postponed, on payment of costs of the day by the defendant, who was not ready to proceed, and the case was ultimately tried on the 14th February:—

Held, that in this particular case the "seven days" required by the statute were to be reckoned backwards from the 27th January, when the plaintiff was ready to go on with the trial, and that the notice served on 23rd January was therefore too late.

Semble, that the statutory phrase, "seven days before the hearing of the action," is to be read as referring to the day originally fixed for the trial, and not to any adjourned day or to the day of actual hearing, and that therefore the hearing of the action began on the 23rd January, when the parties appeared, and the case was put at the foot of the list.

THIS was an action under the Workmen's Compensation Act, tried before BOYD, C., at the non-jury sittings at Toronto, on February 14th, 1908.

J. Kyles, for the plaintiff.

R. A. Reid, for the defendant.

The learned Judge reserved his decision, and subsequently delivered the following judgment, in which the facts are fully set forth.

February 15. BOYD, C.:—The plaintiff was injured on the 12th February, 1907, was taken to the hospital, and stayed there till 13th May.

Notice of the injury was given on 18th May, and the action was begun on 21st June.

The statutory twelve weeks for notice (R.S.O. 1897, ch. 160, sec. 9) expired on 8th May, and the notice was therefore ten days late, but not otherwise insufficient. In law, however, it is to be accounted as no notice or "a want of notice." The defendant on the 8th November pleaded (among other defences) want of notice.

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Issue was joined on 20th November. The case was entered for trial, and first came up on 23rd January, 1908, when it was by direction of the Court put at the foot of the list (apparently because neither party was ready). The list was then nearly exhausted, and though placed at the foot of the list it came on again in due course on the 27th January, when it was again postponed on payment of costs of the day by the defendant, he not being ready to proceed.

On the 23rd January, and later in the day than the postponement, the defendant served notice, under sec. 14 of the Act, R.S.O. ch. 160, that he intended to rely for a defence on the want of notice. The cause ultimately came on to be tried, and was tried on the 14th February, when the question of notice and the merits were argued. By the terms of the statute this last notice is to be served "not less than seven days before the hearing of the action."

In this particular case I think the matter is to be regarded as it stood when the plaintiff was ready to go on with the trial or hearing on the 27th January, and at that point of time seven clear days' notice had not been given, and the indulgence as to delay for the actual trial granted to the defendant should not enure to the prejudice of the plaintiff. Indeed, I would be disposed (if it were necessary) to hold that the 23rd January is the point from which the seven clear days is to be reckoned, as the hearing had then practically begun but was postponed for the mutual accommodation of the parties. This result as to the failure to comply with sec. 14 operates to free the case from any need to deal with the want of the first notice, as to which I need only say that the defendant was in no wise, or in any sense, prejudiced in his defence by the omission.

It has been held that pleading want of notice avails not unless the special notice of sec. 14 is also given in due course: *Wilson v. Owen Sound Cement Co.* (1900), 27 A.R. 328.

Touching the statutory phrase "seven days before the hearing of the action," I think that both by general principles of decision, and by the frame of the Consolidated Rules, this is to be read as referring to the day originally fixed for the trial, and not to any adjourned day or to the day of actual hearing. The reasoning of Cockburn, C.J., applies here as indicating that a determined date is to be sought for and that the day of actual hearing is not so, as it may depend on a variety of circumstances, such as the amount

of evidence to be got through: *Fletcher v. Baker* (1874), L.R. 9 Q.B. 370, followed and approved of as to this in *Regina v. Registrar, etc., at Leeds* (1886), 16 Q.B.D. 691. So also in the rules relating to "Trial," it is provided that "actions entered for trial shall remain for trial:" Rule 544; and the Judge (*i.e.*, at the trial) may postpone or adjourn the trial (Rule 553), and then if postponed the officer attending the trial is to make the appropriate entries (Rule 558). If also the "action is called on for trial" (Rule 545), and the parties appear and it is put at the foot of the list, that transaction is the beginning and a part of the hearing. The trial or hearing has then begun, and from that point backward the seven days' notice should regularly be given: *Tunnickliffe v. Tedd* (1848), 5 C.B. 553, and *Morgan v. Alexander* (1875), L.R. 10 C.P. 184.

This is not a case in which the strict practice as to time should be relaxed in order to enable the defaulter to take advantage of a slip in the plaintiff's practice. In brief, I find that this action should not be turned about for want of the preliminary notice, and justice towards the defendant does not require that a more liberal construction should be placed on the statute for the furtherance of his defence: see *per Osler, J.A.*, in *Cavanagh v. Park* (1896), 23 A.R. 716. Rather than allow the trial of the merits to be frustrated by want of preliminary notice I would direct an adjournment of the case, were it not that such a course would seem to be a work of supererogation: the precise import of which I do not at present perceive.

[The learned Chancellor then considered the evidence and found in favour of the plaintiff.]

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NETTLETON V. THE MUNICIPAL CORPORATION OF THE
TOWN OF PRESCOTT.

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March 2.

Municipal Corporations—Negligence—"Lock-up"—Lack of Proper Heating—Duties of Constable—Caretaker—Acting in Governmental Capacity—Consolidated Municipal Act, 1903—3 Edw. VII. ch. 19, secs. 493, 495, 520, 578, (O.)

A municipality which maintains a "lock-up" is not liable in relation to prisoners who complain of negligence on the part of those in charge thereof, as, for example, in this case, of causing illness through lack of proper heating. In maintaining such a "lock-up," a municipality is not exercising its corporate powers for the benefit of the inhabitants in their local and particular interests, but is performing a public service entrusted to it in the interests of general government. A constable in charge of such a "lock-up," though appointed by the municipality, is not to be regarded as the servant or agent of the corporation, but as a public official, for whose acts or decisions civil responsibility does not attach to the municipality.

Per MAREE, J.—In this case the negligence complained of was that of one who, though a constable, was acting entirely as servant of the corporation, employed in taking care of the municipal buildings, of which the "lock-up" was a part, and the defendants were therefore liable.

An answer of a jury to a question submitted may be rejected as insensible or at unreasonable variance with the other answers.

THIS was an appeal by the plaintiff from the following judgment of Mulock, C.J.Ex.D., in which the facts are sufficiently stated, at the trial of this action before him at the jury sittings at Brockville on October 20th, 1907.

J. A. Hutcheson, K.C., for the plaintiff.

J. B. Clarke, K.C., and J. K. Dowsley, for the defendants.

November 30. MULOCK, C.J.:—The plaintiff was confined in the lock-up owned and established by the defendants, being the municipal corporation of the town of Prescott, and in his statement of claim alleges that whilst he was such inmate the defendants negligently omitted to keep the lock-up reasonably warm, and that such negligence occasioned to him a serious illness, and he brings this action to recover damages because of the injury which he thus sustained. Other causes of action are set forth in his statement of claim, but all except the one above mentioned were abandoned at the trial.

The evidence of the plaintiff went to shew that at the time of his imprisonment he had Bright's disease; that during the night follow-

ing his arrest the cell was allowed to become very cold; that the next day he was found to be seriously ill, was removed to his home, and there suffered a protracted illness.

The case was tried with a jury, and the following are the questions submitted to them and their answers:—

1. Were the defendants guilty of any negligence or breach of duty in respect of the heating of the lock-up? A. Yes.

2. If so, in what did such negligence or breach of duty consist?
A. In not looking after the heating of the lock-up from 12 o'clock Saturday night until 12 o'clock Sunday noon.

3. Was the illness of the plaintiff which immediately followed his imprisonment caused by such negligence or breach of duty?
A. Yes.

4. Was the plaintiff at the time of such imprisonment in a reasonably good state of health? A. Yes.

5. If not, did he make known to Lee or Mooney the fact of his health being impaired and request that the cell be heated so as to meet all reasonable requirements because of his impaired state of health? A. No.

6. If the plaintiff at the time of his imprisonment had been in a reasonably good state of health would the conditions to which he was subject during his imprisonment have caused the sickness complained of? A. Yes.

7. Were the defendants in control of the heating system which supplied heat to the cell? A. Yes.

8. Was Lee, in managing the heating of the cell, the servant of the defendants? A. Yes.

9. What amount of damages, if any, do you award the plaintiff?
A. Award \$250.

After the jury retired to consider the questions, the plaintiff's counsel asked that in lieu of question No. 6 the following question should be submitted:—

“If the plaintiff was not then in a reasonably good state of health, and did make the fact known to Lee or Mooney, did the defendants take reasonable precautions to prevent his suffering injury?”

This question—numbered 6 a—I allowed to be submitted to the

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jury in addition to the nine above mentioned, and the jury's answer to it was "yes."

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This answer may be paraphrased to read as follows:—

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"Having regard to the illness of the plaintiff at the time of his imprisonment the defendants took reasonable precautions to prevent his suffering injury."

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If such precautions were sufficient, supposing the plaintiff, at the time of his imprisonment, to have been in an impaired state of health, *a fortiori*, they were sufficient if he was at that time in a good state of health, and this positive finding in answer to question No. 6 a thus negatives the previous findings of negligence or breach of duty.

Thus there are two inconsistent and irreconcilable findings in regard to a matter which goes to the root of the action, rendering it impossible to base thereon any judgment in favour of either party, and the result is a mistrial.

The appeal was argued before BOYD, C., and MABEE and MAGEE, JJ., on February 19th and 20th, 1908.

J. A. Hutcheson, K.C., for the appellant, contended that where there were two inconsistent findings, one of them can be properly rejected, and that in this case the plaintiff was entitled to judgment.

J. B. Clarke, K.C., for the defendants, was then called upon, and concluded that there was no evidence to go to the jury that the plaintiff's illness was caused by the absence of heat in the cell: *Young v. Owen Sound D edge Co.* (1900), 27 A.R. 649; *Montreal Rolling Mills Co. v. Corcoran* (1896), 26 S.C.R. 595; *Canadian Coloured Cotton Mills Co. v. Kervin* (1899), 29 S.C.R. 478; *McQuay v. Eastwood* (1886), 12 O.R. 402, App. 7 C.L.T. (Occ. N.) 47; that the defendants, in maintaining and caring for the lock-up, were acting in a governmental capacity and not in its corporate capacity: *Eddy v. Village of Ellicottville* (1898), 35 N.Y. App. Div. 256; *Robertson v. City of Marion* (1901), 97 Ill. App. 332; *Levin v. Town of Burlington* (1901), 129 N. Car. 184; *Board of Commissioners of Greene County v. Boswell* (1891), 4 Ind. App. 133; *Lindley v. Polk County* (1892), 84 Io. 308; *Pfefferle v. Board of Commissioners of Lyon County* (1888), 39 Kan. 432; *Hite v. Whitley County Court* (1891), 91 Ky. 168; *Manuel v. Board of Commissioners of Cumber-*

land County (1887), 98 N. Car. 9; and that the municipality was not liable for neglect of duty by a constable: *McCleave v. City of Moncton* (1902), 32 S.C.R. 106; *Thomas v. Canadian Pacific R.W. Co.* (1906), 8 O.W.R. 93, at p. 97.

Hutcheson, in reply, contended that the establishment of a lock-up was a local undertaking, and that the municipality was liable: *Crawford v. Beattie* (1876), 39 U.C.R. 13; *Foreman v. Mayor of Canterbury* (1871), L.R. 6 Q.B. 214; *Edwards v. Pocahontas* (1891), 47 Fed. 268; *Hesketh v. City of Toronto* (1898), 25 A.R. 449; Pollock on Torts, Bl. ed., p. 39; Dillon on Municipal Corporations, 4th ed., secs. 965, 976, 980.

March 2. *Boyd, C.*:—The material circumstances connected with the investigation of this cause of action may be summed up thus:—

An information charging the plaintiff with the crime of theft was laid before a justice of the peace at Cobalt, in Ontario, and a warrant for plaintiff's arrest issued thereon. The plaintiff having left for the town of Prescott, his usual place of abode, an official telegram was sent to Mr. Mooney, the chief of police at Prescott, requesting him to arrest and hold the plaintiff till the arrival of an officer from Cobalt. Pursuant to this requisition, and acting *bonâ fide*, the chief of police of the municipal corporation of the town of Prescott arrested the plaintiff about 8 o'clock on Saturday, April 6th, 1907. He was taken for detention to the "lock-up" house, which was established and maintained by the town council in the basement part of the defendants' municipal building. There he was confined till the evening of next day, Sunday, when, owing to the state of his health, he was released by the chief constable under the certificate of a physician.

The gist of the complaint is that the defendants, through their servant, the chief constable, kept the plaintiff in the cell of the lock-up without any heat, bedding, or covering, through the night, which was bitterly cold, and that the exposure to this cold brought on an attack of disease to which the plaintiff had been subject. The action is, therefore, for negligence of the corporation in the management of the lock-up during the night in question.

Upon the evidence for the plaintiff it appears that he may have first asked for more heat about midnight on Saturday night, because

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(as he puts it) he had an overcoat on, and was walking up and down with pain. This conversation was with the chief constable, who did nothing, and that is the complaint. About 3 in the morning (Sunday) he knocked with a stick to attract Mooney's attention, but with no result. Lee, the caretaker of the building, who was also a constable under Mooney, came round about 6 or 7 in the morning. The plaintiff requested him to send for his wife, and when she came about 11 o'clock a call was made for heat, which Lee endeavoured to supply. On Saturday afternoon the wife admits there was some talk about her bringing down bed-clothes, but the husband would not let her do it.

On the side of the defendants it is in evidence that the steam heat was on all the time, night and day, in the cell, and that when the request was made for more heat on Sunday, Lee turned on other pipes which supplied additional heat from hot water.

Lee affirms that no complaint was made about the heat to him on Saturday, and that when the wife wanted to bring some bed-clothes, the husband said he was an old soldier, and did not want them. Mooney says he told the plaintiff on Saturday afternoon that he could have mattress and bedding brought down to make him comfortable; that there was no complaint made about the want of heat that midnight, and that the pipes were then warm. Mooney knows nothing about the steam or heating department, and has no charge of it. Lee says his duty as caretaker and as to keeping the furnace has nothing to do with his duty as constable.

The lack of heat during the night appears to have arisen from the fact that the hot water supply was turned off in the bank—in an upper part of the municipal building where the lock-up is—and this further source of heat was turned on by Lee on Sunday, when the cold was complained of by the plaintiff's wife.

I doubt whether the lock-up was at any time in the freezing condition described by the plaintiff, and I doubt whether the recurrence of his attack (the kidney trouble) was occasioned by the cold of the cell; but, as the jury have passed upon these matters, I would not disturb the result on the ground of scanty evidence.

It is evident that the whole transaction was managed by the chief of police—neither directed by the defendants nor having any communication with them. This police officer was in charge of the

lock-up and its one inmate, who was throughout in his custody or in the custody of the law till released by the doctor's direction.

The books will be searched in vain to find any example of an action for negligence being maintained against the keeper of a place of criminal detention for its damp, cold, or insanitary state. Not that these objectionable features pertain to the lock-up established and maintained by the municipality; for the evidence shews that it was constructed and its sanitary and comfortable condition provided for with as much care for this part of the building as for the other parts which were occupied for municipal business and by the tenants of the corporation. The whole mischief arose (putting it most strongly for the plaintiff) from the failure to keep up a full head of steam and water heat during one cold night. Of this the defendants had no knowledge or notice; on the contrary, everything had been provided for the proper supply of heat, and any possible omission of care therein rests on the chief of police and Lee, his subordinate. What considerations, then, can be invoked to render the municipality liable? No doubt, Mooney, the chief of police, was appointed by the council in September, 1900, to hold office during pleasure, and Lee was appointed caretaker of the town hall and market by the council—he being also a petty constable under Mooney. The town council (where there is no board of police commissioners) shall appoint one chief constable and one or more constables for the municipality to hold office during the pleasure of the council: R.S.O. 1887, ch. 184, s. 445 (now sec. 493 of Act of 1903, 3 Edw. VII., c. 19 (O.)); and by sec. 495 of the Act of 1903 every such constable shall have the same powers and privileges and be subject to the same liability and to the performance of the same duties, and shall be subject to suspension by the county court Judge, and may act within the same limits as a constable appointed by the Court of Quarter Sessions. Reference is also made generally to the powers and privileges, the responsibilities and duties, which belong by law to constables duly appointed, and *inter alia* the special duties of preserving the peace, preventing robberies and other crimes and offences, and apprehending offenders: see sec. 494, Act of 1903.

Again, as to "lock-up houses," special enactments with that sub-heading are to be found in the Municipal Act under the general title "VIII. Respecting the Administration of Justice," and

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classified under Division III. "Boards of Commissioners of Police and Police Force in Cities and Towns." Section 520 is the one which declares that the council of every town . . . may by by-law establish, maintain, and regulate lock-up houses for the detention and imprisonment of persons detained (for various causes set forth), and such councils shall have all the powers and authorities conferred on county councils in relation to lock-up houses. This includes sec. 578, whereby the county may provide for the salary to be paid to the constable to be placed in charge of the lock-up. For counties the constable in charge is to be specially appointed by the magistrates at General Sessions, but this does not appear to be essential as to a town lock-up, and no point is made as to the status of Mooney, who is called, and acted as, the chief constable of the town, and was in actual charge of the lock-up.

The council passed a by-law to regulate this lock-up in December, 1887, in which it is provided (2) that it shall be in charge and under the control of the chief constable of the town for the time being.

The "lock-up" is a place for the temporary and compulsory confinement and detention of persons under arrest, and it forms with gaols and prisons a necessary portion of the machinery of criminal and penal justice. Under sec. 520 the town may or may not act in providing a lock-up, but the legal consequences of so providing should be the same whether the lock-up is constructed under peremptory or permissive enactment. In either case the lock-up is a contribution to the necessities of the sovereign power in the preservation of public order and the proper administration of justice. The position of the chief constable in charge is akin to that of the sheriff in relation to county gaols.

Lee was a petty constable subordinate to the chief, and was also caretaker of the whole building, in the sense of having to keep it cleaned, lighted, heated, etc. Mooney was the chief constable and in charge of that part of the building which formed the "lock-up," in the sense of having care and custody of the prisoners there confined.

Now as to the law. There is no case in Canadian courts as to the civil liability of municipal corporations in relation to prisoners who complain of improper accommodation in their place of confinement. Admitting the existence of the duty set up in the statement of claim, that is, to maintain the place properly warmed and reason-

ably clean in order to furnish accommodation which would not endanger the prisoner's health—that was fulfilled. Everything was furnished to this end, and the failure to make due use of the appliances was not the fault of the municipality, and was not known to the municipality.

Are the defendants liable then because, as the accident of a night, the lock-up is too cold for the well-being of the plaintiff?

The question has, however, been much considered in American courts, and a remarkably unanimous result arrived at. The cases proceed on an underlying principle affecting the composite character of municipal government. The municipal body may exercise its corporate powers for the benefit of the inhabitants in their local and particular interests, or it may act with delegated powers for the benefit of the community at large, and in the performance of a public service intrusted to it as a convenient method of exercising some of the functions of general government. In the former case civil responsibility attaches to the municipality, its servants and agents, as to any other corporate body. In the latter case officers elected or appointed by the municipality are not regarded as servants or agents of the corporation, but as public officials, for whose acts or decisions civil responsibility does not attach to the municipality, and as to whom the doctrine of *respondeat superior* does not hold good. This principle has obtained recognition in several Canadian cases. Thus, in *McSorley v. The Mayor, etc., of the City of St. John* (1881), 6 S.C.R. 531, p. 548, Ritchie, C.J., accepted the exposition of the law given by Dillon in these words: "If the duty, though devolved by law upon an officer elected or appointed by the corporation is not a corporate duty, the officers of the corporation, in performing it, do not act for the corporation, and hence the corporation, is not responsible (unless expressly declared so to be by statute) for the omission to perform it or for the manner in which it is performed." And in *McCleave v. City of Moncton*, 32 S.C.R. 106, Strong, C.J., expresses the same theory thus: "The police officer or constable held his appointment from the corporation for the purpose of administering the general law of the land, and the wrong complained of in this case was not committed by him while in the exercise of a duty of a corporate nature which was imposed upon him by the direction or authority of the corporation merely." And in that case the decision of

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the Court was that a police officer is not the agent of the municipal corporation which appoints him to a position, and, if he is negligent in performing his duty as guardian of the public peace, the corporation is not responsible.

At a much earlier date, in 1871, Mr. Justice Badgeley adopted the pertinent language of Chief Justice Bigelow in an oft-quoted case of *Buttrick v. City of Lowell* (1861), 1 All. 83 (Mass.) 172: "The detection and arrest of offenders, the preservation of the public peace, the enforcement of the laws and other similar powers and duties with which police officers and constables are entrusted, are derived from the law, not from the city or town under which they have their appointment. . . . Police officers can in no sense be regarded as agents or servants of the city. Their duties are of a public nature. Their appointment is devolved on cities and towns by the legislature as a convenient mode of exercising a function of government, but this does not render them liable for their unlawful or negligent acts:" *Corporation of Montreal v. Doolan* (1871), 19 Math. R.R. 125, at p. 131. Again, reference is made in *Schmidt v. Town of Berlin* (1893), 26 O.R. 54, at p. 58, to the American doctrine that there is no liability to the tenants for the failure of a municipal corporation to keep buildings used exclusively for public purposes in a reasonably safe condition for use, inasmuch as these buildings are held for public purposes only, and the corporation acts in its governmental character in maintaining them.

In *Kelly v. Barton* (1895), 26 O.R. 608, at p. 623, it was held that (constables) police officers were not officers or agents of the city corporation, but were independently appointed by the board of police commissioners as an agency of good government for the benefit of the municipality.

And in *Forsyth v. Canniff and the City of Toronto* (1890), 20 O.R. 478, it was decided that the medical health officer of a municipal corporation—a permissive appointment under the Public Health Act by the corporation—was not a servant of the corporation, to render it liable for mistakes made by him in the pursuance of his statutory duties. The same head of law is very fully discussed in *McCleave v. City of Moncton* (1901), 35 N.B. 296, and also considered by Mr. Justice Clute in *Butler v. City of Toronto* (1907), 10 O.W.R. 878.

I may note that *Forsyth v. Canniff* was cited in the important English case of *Stanbury v. Exeter Corporation*, which I am about to dwell upon.

This same test, characteristic of American law, appears for the first time to have been serviceably applied in England by the Judges in the late decision of *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838. Local authorities were held not liable for the negligence of an inspector appointed by them, who detained some sheep in a market on the supposition that they were infected with disease. Passages from the judgments illustrate the present litigation. Alverstone, L.C.J., said: "This is not an ordinary case of delegation by the corporation of duties which they had to perform. . . . It is analogous to that of police and other officers appointed by a corporation, who have statutory duties to perform, where, although they owe a duty to the corporation appointing them, there is no ground for contending that the corporation are responsible for their negligent acts:" p. 841. Still more explicit is Mr. Justice Wills: "This case is almost exactly analogous to the case of a police officer. In all boroughs the watch committee, by statute, has to appoint, control and remove the police officers, and nobody has ever heard of a corporation being made liable for the negligence of a police officer in the performance of his duties. . . . If the duties to be performed by the officers appointed are of a public nature, and have no peculiar local characteristics, then they are really a branch of the public administration for purposes of general utility and security, which affect the whole kingdom, and if that be the nature of the duties to be performed, it does not seem unreasonable that the corporation who appoint the officer should not be responsible for the acts of negligence or misfeasance on his part:" p. 843. And, more briefly, Mr. Justice Darling: "To my mind the question whether the local authority are liable for the inspector's negligence depends upon whether the act done purported to be done by virtue of corporate authority or by virtue of something imposed as a public obligation to be done, not by the local authority, but by an officer whom they were ordered to appoint. The particular things which the inspector did here were things which the corporation could not do themselves, and they were not, in fact, doing them. They had to carry out the Act, and had to do that by appointing an officer:" p. 843.

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The whole subject is reviewed in the last edition of Beven on Negligence, 3rd ed., vol. 1, pp. 326-329. The same principles appear to be substantially involved in *Tozeland v. Guardians of West Ham Union*, [1907] 1 K.B. 920, a case later than Beven. For statement of American point of view see Cooley on Torts, 3rd ed., pp. 1012-1014; and Smith on Modern Law of Municipal Corporations, vol. 1, sec. 799.

I come now to direct decisions upon the very matter of this present controversy to be found in the American reports, a few of which it will suffice to refer to. First may be noted the view taken in the exceptional state of North Carolina, where a possible liability exists, if such proof of notice of deficiencies is given as obtains in case of want of repair in highways. Thus, in one of the latest reports, *Coley v. City of Statesville* (1897), 121 N.C. 301, if a municipality has provided for prisoners arrested for violation of its ordinances a prison house reasonably comfortable, and has supplied to those in charge of it all things reasonably essential to prevent bodily suffering and disease, it is not liable for injuries resulting to a prisoner from the negligence of the keeper, unless the municipal authorities had, after notice of such negligence, failed to remedy or prevent the same.

In commenting on the North Carolina cases, it is said by the Court in *Shaw v. City of Charleston* (1905), 57 W.Va. 433, that it is the only State in the Union where the doctrine of municipal liability for injuries resulting from imprisonment in unsanitary places has been adopted, and even there the liability is restricted so that upon the city is imposed only the duty of properly constructing and maintaining the prison and exercising ordinary care in providing necessaries. But it is not liable for injuries resulting from the negligence of policemen or the keeper in failing to make use of the appliances furnished, unless the municipal authorities have had notice of such negligence, and have failed to remedy the evil. It was held, again, in this West Virginia case, broadly, that the municipality was not liable for injuries occasioned to a person by the unsanitary condition of its prison while he was confined therein for violation of a city ordinance; and, further, that the maintenance of a prison is the exercise of a purely governmental power and negligence or omission of duty on the part of its officer or agents respecting persons confined therein is not

actionable against the municipality. The judgment refutes the distinction made in *Edwards v. Town of Pocahontas*, 47 Fed. 268, as between voluntary and compulsory exercise of its powers in regard to the establishment of places of detention, and holds that a difference in the method by which the corporation obtains the legislative powers vested in it cannot change the character of its power, and impose liability for its negligent exercise when the legislature has not expressly provided for such liability. A prison or lock-up, however it comes into being, is an instrumentality or agency required for the exercise of the purely governmental function of enforcing the criminal law, and it has no relation to its corporate or municipal property.

Maine: In *Mains v. Inhabitants of Fort Fairfield* (1904), 99 Me. 177, the general propositions are maintained that towns are incorporated for two distinct purposes—one for the particular welfare of their own inhabitants; the other for the general welfare. In pursuing the one, they may be liable in contract or in tort at common law for the acts or omissions of officers appointed by them. In pursuing the other purpose, they are not so liable. And it is held, in particular, that, in maintaining a police “lock-up,” a town is pursuing not a municipal, but a public purpose, being the maintenance of the justice and the peace of the State, and hence, in the absence of any statute imposing liability, the town is not liable for the neglect of its officers (selectmen) in the care of it. A constable, in committing a prisoner to the town lock-up as a place of detention, acts for the State, and under its authority (if any). He does not act for the town, nor under its authority, though he may have received his appointment from the town. He is a public officer as much as a sheriff.

The constable was under no compulsion and had no direction from the town to confine the plaintiff there. He acted upon his judgment in the exercise of a duty imposed upon him not by the town, but by the State, viz., the safe-keeping of the plaintiff: *Ib.*, p. 180.

Ohio: *Rose v. Toledo* (1903), 24 Cir. Ct. 540, held that a city, in constructing and maintaining a workhouse (which is also a place of detention for violators of law), acts not in its corporate, but in its governmental capacity, and hence is not liable to a prisoner in such place for injuries received through the wrongful acts of

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the superintendent thereof. It is, further, held that police officers appointed by a city are not its agents and servants, so as to render it responsible for their negligent acts in the discharge of their duties.

A well-considered judgment of a Court of acknowledged excellence is that of *Tindley v. Salem* (1884), 137 Mass. 171. The cases are classified in which it has been sought to hold municipalities responsible for injuries to person or property sustained through negligence on the part of persons alleged to be acting as agents or servants of the municipality. Allen, C.J., distinguishes easily cases where the city is exonerated on the ground that the act complained of is not its act, but the act of those who are deemed to be public officers existing under independent provisions of law; officers who, though appointed and paid by the city or town, and though, perhaps, its servants or agents for other purposes, are yet held not to sustain this relation in respect to the particular act in question—as, for example . . . police officers: *Buttrick v. City of Lowell*, 1 All. (83 Mass.) 172, at p. 174. Then he deals with the element in this case which is relied on as causing responsibility, because the town had its option to establish or not to establish the lock-up. I quote his language: "There are many provisions of statute by which all municipal corporations must do certain things and may do certain other things, in each instance with a view solely to the general good. In looking at these provisions in detail, it is impossible to suppose that the legislature have intended to make this distinction a material one in determining the question of corporate liability to private actions. . . . The motive and the object are the same, though in some instances the legislature determines finally the necessity or expediency, and in others it leaves the necessity or expediency to be determined by the towns themselves. But, when determined, and when the service has been entered upon, there is no good reason why a liability to a private action should be imposed when a town voluntarily enters upon such a beneficial work, and withheld when it performs the service under the requirement of an imperative law. To make such a distinction would not have the effect to encourage towns in making liberal provision for the public good": pp. 175, 176, 177.

This same doctrine as to the voluntary nature of the service

not making any difference as to whether those discharging its duties were or were not public officers was confirmed in *McManus v. Inhabitants of Weston* (1895), 164 Mass. 263, at p. 270.

I venture to think that reasons of public policy are against allowing actions of this kind to prevail against prison authorities, of whatever grade the place of incarceration may be. As put by the Chief Justice, in an Australian case (to which Mr. Clarke has referred us): "Every detention might be followed by an action; one prisoner complaining of the quality or quantity of his food, another of his cell being damp or cold, another that his bedding was insufficient, another that he had unduly to undergo punishment within the gaol for alleged misconduct. These cases would have to be determined by juries—thus, in effect, taking the management of our gaols out of the hands of skilled officials, . . . and replacing them by the uncertain, unstable and unskilled management of the jury box:" *Gibson v. Young* (1900), 21 N.S.W.L.R. 7, at p. 12. Another case from the same colony is valuable, as it refers to the position of "lock-ups," which are there built and maintained by the government. As to these, the government occupies relatively the same place as does the municipality in our system. The decision was that lock-ups are not under the control or supervision of the government, but of the police, who confine the inmates, not as agents of the government, but in the exercise of their statutory power and duties: *Davidson v. Walker* (1901), 1 N.S.W. 196. In a case therein cited, Stephen, J., says: "The acts of a police constable are not in any sense performed on behalf of the government, but are done by reason of the allegiance he owes to the Crown." As expressed by Lord Mansfield, "the office of constable is clearly a civil office of trust:" *Rex v. de Mierre* (1771), 5 Burr. 2788, at p. 2790. Such being his position, he is required to take the oath of allegiance for civil office prescribed by R.S.O. 1897, ch. 16, sec. 3.

Other remedies exist for substantial grievances in the conduct of all places of compulsory custody. The management of all gaols and lock-ups is conducted on humane principles, and any well-founded grievances arising from the negligence of those in charge would be redressed by the governing bodies or punished by fine or by the suspension or dismissal of the blameworthy official. This matter was touched upon by Harrison, C.J., in

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Crawford v. Beattie, 39 U.C.R. 13, at p. 31, who advised a system of government inspection, which has been carried out generally in this country. Though the occasion invited, he was far from expressing any opinion that the municipal body would be justiciable, even if clearly to blame for the improper condition of the prison. It is laid down in *Hawkins' Pleas of the Crown*, vol. 2, p. 213 (sec. 32), that the Court of King's Bench, which has general supervision over all persons who are in any respect ministers of justice, may punish by fine or award an attachment against any gaoler using a prisoner barbarously or inhumanly. But whatever be the appropriate remedy for systematic or occasional neglect by the custodian of prisoners, a right to proceed by action has never been sanctioned, and the present attempt is altogether an experiment.

If the plaintiff is rightly in court, I would not think that a new trial was proper, in view of the apparently discordant responses of the jury. The answer to the last question (6a) may be rejected as insensible or at unreasonable variance with the other answers, as was done in *Crown Bank of Canada v. Brash* (1907), 8 O.W.R. 400, 9 O.W.R. 789; or it may be read and reconciled as pointing to the time during the imprisonment when more heat was asked for on the Sunday, and Lee bestirred himself to light a fire in the stove, and to turn on a supply of hot water in the lower coil of pipes in the lock-up. By either method the apparent difficulty would be obviated, and the course cleared to enter up judgment for the plaintiff for the \$250.

But, taking the view I do of the entire failure of the groundwork of this claim as against the municipality, I would dismiss the action. Being a new case, it may be without costs, alike as to action and appeal.

MAGEE, J., concurred.

MABEE, J.:—3 Edw.VII. ch. 19, sec. 520 (O.), provides that every town may, by by-law, “establish, maintain and regulate lock-up houses.” Section 518 empowers county councils to “establish and maintain” lock-up houses, but, under sec. 519, these places of detention, when established by counties, are placed in charge of a constable specially appointed by the magistrates at a general

sessions of the peace. A town lock-up is maintained and regulated by the council.

On December 5th, 1887, the defendants, by by-law, enacted as follows: "(1) The lock-up in the town of Prescott, consisting of the cells in the basement of the building known as the town hall, shall continue to be, and is hereby established as, the lock-up of the said town. (2) The said lock-up shall be in the charge and under the control of the chief constable of the town of Prescott."

On April 17th, 1899, a resolution was passed by the council whereby Robert J. Lee was "appointed the caretaker of town hall and markets, to fill the same duties performed by Mr. H. Stephenson."

On April 18th, 1900, James Mooney was appointed chief of police for the town.

Now, if the negligence alleged in this case were the negligence of Mooney, I would at once accede to the contention that the defendants were not liable: *McCleave v. City of Moncton*, 32 S.C.R. 106; but the whole case proceeds upon the negligence being that of Lee, and not of Mooney. It is true the by-law placed Mooney in charge of the lock-up, but it is equally clear, upon the evidence, that Mooney had nothing to do with its heating; that was, and had all along been, a part of the duties of Lee, not as a constable, but as the caretaker of the municipal building. Mooney had nothing to do with the heating, and had no means of controlling it. The stove in the hallway, the mayor says, was not intended for use when the steam heating was in operation. In his time (Lee was his successor, and was appointed to fill the same duties he had performed) this stove was never used. The steam heating plant was ample, and by it, he says, the temperature could be raised to 100 in the cells. The steam is constantly on, day and night, furnace continually going from fall until spring, and the fire kept up all the time. The mayor says that when he was caretaker it was never any part of the duties of the chief of police to attend the furnace; it was solely the duty of the caretaker, and that it is still so. Lee is also a constable, but he admits his work and duties connected with caretaker of the building, including attending the furnace, form no part of his duties as constable.

All this was kept clearly in mind at the trial. The jury found

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that Lee, in managing the heating of the cell, was acting as a servant of the defendants; and upon this point the learned Chief Justice charged them as follows:

"Lee was in general charge of the whole system, including the branch into the cell. Was he, as such manager of the heating, acting as a servant of the defendants? Was he obliged to take orders from them? Was he obliged to maintain the heating and appliances, etc., in conformity with the instructions from the defendants, or was he free to treat that cell as in his judgment he saw fit, without any interference from the defendants? If they had nothing whatever to say about the heating of that cell, then you would say that Lee was attending to the heating in his character as constable, as a police officer having another duty as well. If, on the other hand, he was entrusted by the town with the general management of this heating system, and had to conduct the heating of the cell and all parts of the building on the same principle, subject to the control and the orders entailed on him from the municipality, from time to time, so that he could be held responsible to them for the manner in which he did the heating, then he would be performing that part of the work as a servant of the corporation."

It is apparent from perusing the evidence that the plaintiff was not contending that the defendants were liable for something that the chief of police had or had not done, but was attempting to fasten liability upon the defendants by reason of the negligence of their servant in not properly attending to the furnace upon the night in question. The jury find the plaintiff's health was injured because of their negligence in not looking after the heating of the lock-up from 12 o'clock on Saturday night until 12 noon on Sunday.

Lee was in no way an independent public officer, nor one upon whom any duty devolved by law, but, as found by the jury, and really as to which there was no conflict, a servant of the defendants, with duties specified by them which he was bound to perform. Why, then, are the defendants not liable, on the maxim *respondeat superior*, for the neglect of Lee?

A municipality has been held not to be liable for the acts of an engineer appointed under the provisions of the Ditches and Watercourses Act: *Seymore v. The Township of Maidstone* (1897),

24 A.R. 370; nor for the acts of a medical health officer: *Forsyth v. Canniff and the City of Toronto*, 20 O.R. 478; but in these cases, and many others of a like character, the reasons given for exempting the municipality from liability are that the duties of the officers are defined by statute, and, once appointed, they become officials clothed with the authority bestowed upon them by the Acts for the furtherance of which they have been so appointed.

Late English cases, I think, convey the same principles. In *Stanbury v. Exeter Corporation*, [1905] 2 K.B. 838, the fact was found that the relation of master and servant did not exist *quâ* the acts complained of, inasmuch as the Board of Agriculture had ordered that the local authorities should execute and enforce the Act. In *Tozeland v. The Guardians of West Ham Union*, [1905] 1 K.B. 920, the inquiry turned upon the proper interpretation of the Poor-Law Acts, and of the rights of a person coming in as a pauper and placing himself under the provisions of the statutes.

The American cases cited all deal with the police feature, and, to my mind, that is not an element in this case. It makes no difference that Lee happened to be a constable. He was sworn in about the same time he was appointed caretaker, and, I presume, because he was caretaker. If the defendants had placed and left the lock-up in charge of the chief of police, and had not otherwise interfered in its management by the appointment of a servant of their own to attend to it, the position might have been different. In *Eddy v. Village of Ellicottville*, 35 N.Y. App. Div. 256, it was held that a village, in the maintenance and care of the village jail, acts in a governmental and not in its corporate capacity; and was not liable where a prisoner, while confined in an unheated room, the windows of which were broken, contracted a severe cold, terminating in pneumonia.

The converse of this was held by the Supreme Court of North Carolina in *Lewis v. City of Raleigh* (1877), 77 N.C. 229; also in *Shields v. Town of Durham* (1895), 116 N.C. 394.

In *Edwards v. Town of Pocahontas*, 47 Fed. 268, it was held that a municipality, which having power to maintain a jail, although not required so to do, undertakes to exercise the power, will be liable for the negligent exercise of it in keeping the jail in an unhealthy and filthy condition, whereby the health of a prisoner is injured. In *Eddy v. Village of Ellicottville*, the Court says

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there is much conflict of authority in the decisions of other States bearing upon this question. In the case last cited, it was said that a municipality, though a political division of the State, possesses two separate and distinct powers, one of which may be termed governmental or public, and the other private or corporate; that in the exercise of the former the municipality is invested with the quality of sovereignty; while in the exercise of the latter it occupies the same relation to the individual that any other corporate body does, and that if the duty of maintaining a village lock-up falls within its corporate duties, then it is liable in a civil action. Whether the distinction referred to between the so-called sovereign powers and the corporate powers of the local municipality has any existence under our system of municipal institutions it is not needful to consider, because, as I view the facts of this case and the jury's findings thereon, it is as clear as can be that the town was, in the maintenance of this lock-up, exercising corporate powers.

The by-law sets apart a certain part of the basement of the municipal building to be used as a lock-up. There is one furnace used to heat all parts of the building. There is in it a town hall, and offices for the officers of the corporation. Part of the premises is rented to a bank, and one caretaker (Lee) superintends the whole building. Steam from the furnace passes through the pipes and coils of the whole building, including the lock-up. This latter was established with the intention that it should be used, the corporation undertook to maintain it, and, I think, thereupon there arose a duty upon the corporation to so maintain that the health of those that might be confined therein should not be endangered. In *Mersey Docks Trustees v. Gibbs* (1866), L.R. 1 H.L. 93, at p. 110, it is said: "In the absence of something to shew a contrary intention, the legislature intends that the body, the enactor of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law⁶¹ would impose on a private person doing the same things." This statement of the law is not confined to cases where the local body is carrying on a work for advantage or profit, but extends to cases where the work is for the public benefit without any profit accruing therefrom. The corporation is not bound to establish a lock-up, and possibly not to maintain it, after having established

it, but, having undertaken this duty, I am of opinion that the law then imposes upon it the obligation of exercising reasonable care in seeing that inmates do not suffer as the evidence shews this plaintiff did: *Hesketh v. City of Toronto*, 25 A.R. 449.

Cases like *McCleave v. Moncton* (*ante*) afford no assistance, as the complaint is not that a police officer was negligent.

I agree that upon the authority of *Crown Bank of Canada v. Brash*, 9 O.W.R. 789, the answer to question 6(a) can be discarded.

The defendants' appeal should be dismissed with costs, and judgment entered for the plaintiff for \$250 damages and costs throughout.

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April 23.

*Motor Vehicles—Automobiles—Negligence—Onus—Responsibility of Owner—
Special Act—6 Edw. VII. ch. 46 (O.)—Chau[ff]eur on Errand of his own—
Fines and Penalties—Action for Damages.*

A chauffeur, having received permission to have his master's motor for a few minutes, in order to take some things to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride, and, on returning with them to their father's house, injured the plaintiff. The jury held that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident:—

Heid, that, having regard to the terms of 6 Edw. VII. ch. 46 (O.) (an Act to regulate the speed and operation of motor vehicles on highways), which casts the onus on the defendant when his motor has occasioned an accident, and makes him responsible for any violation of the Act, there was enough evidence to support the findings.

Semble, that under the Act the chauffeur is to be regarded as the *alter ego* of the proprietor, and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own.

Semble, also, that under sec. 13 the owner of a motor vehicle for whom a permit is issued is responsible not only in regard to fines and penalties imposed by the Act, but also in damages, for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council.

THIS was an action to recover damages in respect to injuries sustained by the plaintiff through an automobile, owned by the defendant and in charge of his chauffeur, having collided with him on November 13th, 1907, near the corner of Lansdowne avenue and Dundas street, in the city of Toronto.

The defendant alleged in his statement of defence that the injury to the plaintiff was caused by his own contributory negligence.

The action was tried on February 3rd, 1908, before Mabee, J., and a jury, at Toronto, and the damages were assessed at \$450, the trial Judge reserving a motion for nonsuit.

On February 11th, 1908, he, without giving any reasons, entered judgment for the plaintiff on the findings of the jury for \$450 and costs.

The following were the questions put to and answers made by the jury:—

(1) Has the defendant proved to your satisfaction that the loss or damage to the plaintiff did not arise through the negligence or improper conduct of Fox (the chauffeur)? A. No.

(2) Was the plaintiff guilty of any carelessness or negligence that caused or contributed to the accident? A. No.

(3) Was Fox acting within the general scope of his employment or authority at the time of his accident? A. Yes.

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The defendant appealed from the above judgment, and the appeal was argued on April 15th and 16th, 1908, before BOYD, C., FALCONBRIDGE, C.J.K.B., and TEETZEL, J.

R. Greer, for the defendant, referred to 6 Edw. VII. ch. 46, sec. 18 (O.),* and contended that, though that section shifted the onus on the defendant, the defendant had satisfied it, and no jury could reasonably hold otherwise; that there was absolutely no evidence of negligence; and that the chauffeur was not working in his employer's service at all. He referred to *Stewart v. Baruch* (1905), 93 N.Y. Supp. 161 (127 N.Y. State Rep.); *Wills v. Belle Ewart Ice Co.* (1906), 12 O.L.R. 526; *Joel v. Morison* (1834), 6 C. & P. 501; *Storey v. Ashton* (1869), L.R. 4 Q.B. 476; *Stretton v. City of Toronto* (1887), 13 O.R. 139; *Sanderson v. Collins*, [1904] 1 K.B. 628; *Cheshire v. Bailey*, [1905] 1 K.B. 237, 245.

J. M. Godfrey, for the plaintiff, contended that there was evidence of negligence in the fact that the chauffeur failed to get the car under strict control when approaching the crowd, and failed to blow the horn nearer than the corner of the street; that if the jury disbelieved the defendant's witnesses, the plaintiff was entitled to succeed; that there was evidence that the chauffeur was acting within the scope of his employment, namely, of attending to the machine from time to time, and to run the car, and that, at any rate, so soon as he turned to come home he had returned to his duties and was on his master's business; that under the statute the owner is liable even if his chauffeur is not acting within the scope of his employment: *Denton on Municipal Negligence*, p. 211; that motors are such dangerous things that the principle of *Fletcher v. Rylands* (1866), L.R. 1 Ex. 265, and *Dixon v. Bell* (1816), 5 M. & S. 198, applies: *Pollock on Torts*, 7th ed., p. 492.

* 6 Edw. VII., ch. 46, sec. 18 (O.):—"When any loss or damage is incurred or sustained by any person by a motor vehicle, the onus of proof that such loss or damage did not arise through the negligence or improper conduct of the owner or driver of the motor vehicle shall be upon the owner or driver of such vehicle."

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He also referred to *Haverstock v. Emory* (1906), 7 O.W.R. 799, 8 O.W.R. 528.

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Greer, in reply, contended that nothing must be read into sec. 18 which is not there, and that no presumption is raised by the statute that a chauffeur is acting within the scope of his employment; that as to secs. 5 and 7,* the requirements of the statute had been satisfied.

April 23. The judgment of the Court was delivered by BOYD, C.:—In the disposal of this case by the jury very much depends upon the view they may have taken of the chauffeur's credibility. There are many important details in which he is quite at variance with the other witnesses. Mahoney, the constable, says he was three or four yards from the motor when it struck the plaintiff; he saw the man hit by the automobile and fall under the front wheels, and saw the machine roll back off him. The front wheels went on the man, injuring his throat, chest and leg (as he says), and then the machine rolled back. Fox, the chauffeur, says "the man was running down the street, and ran right into me, and broke the glass. The wheel did not go on top of him. I ran up to him, and reversed and backed away." Besides the contradiction, this would be important in considering the matter of speed—the man says he was walking, and was run into before he saw the automobile. There was a crowd of 15 or 20 people gathered below the corner at the intersection of College street and Lansdowne avenue—some 36 yards south on the west side of Lansdowne avenue—gathered on account of an accident that had just happened to a young man and a bicycle, and out of this crowd the plaintiff stepped to take a car which had stopped on the opposite side. There was another crowd gathered to take the cars at the corner of the street. He looked, as he says, before

* Section 5 (1):—"Every motor vehicle shall be equipped with an alarm bell, gong, or horn, and the same shall be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach of any such vehicle. . . ."

Section 7:—"Notwithstanding the provisions of section 6 hereof, if any person drives a motor vehicle on a public highway recklessly or negligently or at a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway and to the amount of traffic which actually is at the time, or which might reasonably be expected to be on the highway, that person shall be guilty of an offence under this Act."

going on the street, but saw no motor and heard no warning from the horn or gong, and the next thing he knew was that he was struck and hurt. Fox says the man was twelve feet distant when he saw him first, and that he could stop, and did stop, the car within six feet. If the man was walking, the chauffeur could have avoided the impact, if his car was under proper control. As to the sounding of the horn, the chauffeur says he sounded it at the corner, and after he passed through the first crowd, and at intervals as he came to the second crowd. The witnesses who were in the motor with him do not corroborate this, and speak only of warning given as they came to or rounded the corner. The policeman and the plaintiff say they heard no horn or other warning.

The chauffeur Fox says that on the occasion he asked permission of Miss Gillies to have the car for a few minutes to go to Mr. Fretwell's to take some things there, and she assented. He went there with the things, and then three daughters of Mr. Fretwell (who was servant and caretaker of Mr. Gillies' place) asked him for a ride, and in giving them this ride the accident happened. He is very uncertain and unsatisfactory as to time. He says, first, he had left Gillies' house with the automobile about half an hour. It was apparently a few minutes' drive to Fretwell's, and then he had driven about two or two and a half miles before the accident. Those with him say they had been going about half an hour before the man was injured. And, summing up the whole time, Fox says that he had been away altogether about an hour and three-quarters before the accident. He says, again, he was on his natural way home to Mr. Gillies' house when the accident happened, and he was going down Dundas on his way home. That he afterwards changes, in reply to leading questions, by saying that he meant going back to Mr. Fretwell's house. He says, again, that he borrowed the car to take the parcels to Fretwell's, and after that he borrowed it for himself for that time. Miss Gillies, who is said to have given the direction, is not called. Her father, the defendant, was absent from the city at the time, and, being examined for discovery, gives this account: "I really don't know whether the chauffeur was on my business or not. . . The general understanding is that a car is not to be taken out unless I wish to do so, or some member of my

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family. I understand he went to the house of my caretaker, the caretaker of my lawn, on some message from the house—*i.e.*, my own house. He had a perfect right to take the automobile out to do that, under the instructions of my daughter. He would be about my business, in that sense, up to that time.”

And at the trial he said the duties of Fox were to run the car, to look after it, and take care of it—that is, the ordinary duties of a chauffeur, whatever they might be—attending to the machine from time to time. There is no complaint as to the charge, and, having regard to the terms of the special Act, which casts the onus on the defendant where his motor has occasioned an accident, and makes him responsible for any violation of the Act (6 Ed. VII. ch. 46, secs. 13* and 18 (O.);† also sec. 12, incorporating the present ch. 236, sec. 14),‡ I think there was enough evidence to support the case of the plaintiff and the findings of the jury. The jury were not satisfied that a defence had been made out, either on the head of absence of negligence or of absence of authority as between owner and chauffeur.

If Fox is discredited, it needs no further explanation or support for the verdict. “It has been more than once noticed that the idea prevails among some motor drivers that, when once they have sounded the horn, they are justified in going at any rate of speed, and that people are bound to get out of their way” (see *per* Lord Alverstone in *Troughton v. Manning* (1905), 69 J.P. 207), whereas the more salutary rule would be as recommended by the Considerate Drivers’ League, “assume that it is *your* business, and not the other man’s, to avoid danger:” Pettit, Motor Cars, p. 81. The facts in this case were such as to require the intervention of a jury to decide whether the injury occurred while the driver was acting within the scope of his authority. The chauffeur, who was employed by Gillies, and paid solely for the purpose of attending to the automobile, had general charge and care of it,

* Section 13:—“The owner of a motor vehicle for which a permit is issued under the provisions of this Act shall be held responsible for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council.”

† See *supra*, p. 559n.

‡ R.S.O. 1897, ch. 236, sec. 14 (An Act to regulate travelling on Public Highways and Bridges):—“No such fine or imprisonment shall be a bar to the recovery of damages by the injured party before any court of common jurisdiction.”

and, having express permission to take it out on the afternoon of the day in question, he was on his master's business, though he made a detour to give a ride to his friends, according to the doctrine of *Joel v. Morison*, 6 C. & P. 501, which stands approved in many cases: *Whatman v. Pearson* (1868), L.R. 3 C.P. 422; and *Burns v. Poulson* (1873), L.R. 8 C.P. 563, 567. As in *Venables v. Smith* (1877), 2 Q.B.D. 279, 281, "he was on his way home, though he went in a somewhat roundabout way," in order to gratify his friends; and the motor was entrusted to his general care: *Sleath v. Wilson* (1839), 9 C. & P. 607. Besides this, I am inclined to hold that, having regard to the provisions of the Act, as to registration of the owner, the carrying of a number on the machine for the purpose of identification, and the permit granted on those conditions, as between the owner and the public, the chauffeur or driver is to be regarded as the *alter ego* of the proprietor, and that the owner is liable for the driver's negligence in all cases where the use of the vehicle is with the sanction or permission of the proprietor. In driving the motor he is within the ostensible scope of his employment, and the liability will remain by virtue of the statute, and this even though the driver may be out on an errand of his own.

It was open for the jury to find that the Act had been violated as to the requirements of sec. 5 (which provides that the horn is to be sounded whenever it shall be reasonably necessary to notify pedestrians or others of the approach), and also as to the requirements of sec. 7, in that the motor was handled in a manner dangerous to the public, having regard to all the circumstances of the case, the crowds, etc. As to such and other violations, the owner of a motor for which a permit is issued "shall be held responsible": sec. 13. That would cover responsibility in regard to fines and penalties imposed by the Act, and may it not also civil responsibility for damages? Section 12, which precedes this section as to responsibility, incorporates the provisions of the Act relating to Travelling on Public Highways, one section of which, sec. 14, is important in this relation. That declares "that no such fine or imprisonment shall be a bar to the recovery of damages by the injured party before a Court of competent jurisdiction." The collocation of the sections suggests that a liberal reading is to be given to the "responsibility" clause—as is, indeed, the general

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canon to be observed in the interpretation of the revised and other statutes: 7 Ed. VII. ch. 2, sec. 7, sub-sec. 41 (O.).* This clause as to general responsibility for the negligent conduct of this swift and noiseless source of danger on the streets is not unique or even singular. In several of the States of the American Union similar or analogous provisions are to be found.

Thus, in North Dakota it is enacted in one section, sec. 5, that any person, whether driver or operator of the automobile, or the owner thereof, whose agent the driver or operator shall be, who shall violate any of the provisions of the Act, shall be punished by fine; and, in addition, the owner shall be liable for damages in a civil action to any person injured by reason of such violation: Huddy's Law of Automobiles, p. 263.

In Tennessee it is provided by statute that wherever a suit for damages is brought for injuries caused by the running of a motor in violation of the Act, there shall be a lien on the machine for the satisfaction of the amount recovered, whether the automobile at time of injury was driven by the owner or by his chauffeur, agent, employee, servant, or any other person using the same by loan, hire, or otherwise (sec. 5): Huddy, p. 298. A similar lien is given on the automobile by the state of Virginia (sec. 12): Huddy, p. 310; and sec. 4, Act of 1902: Huddy, p. 313.

By the statute of Kentucky a lien is made to attach on the vehicle which causes the injury or damage, in a suit for damages against any one who violates the provisions of the Act (sec. 7): Huddy, p. 167.

Reference may be also made to the provisions of the English Hackney Carriage Acts, as expounded in the cases *King v. London Improved Cab Co.* (1889), 23 Q.B.D. 281, 283; and *Venables v. Smith*, already cited; *Keen v. Henry*, [1894] 1 Q.B. 292.

Altogether there is no reason to disturb the verdict and the judgment under appeal, and it will stand affirmed, with costs.

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* 7 Edw. VII., ch. 2, sec. 7, sub-sec. 41 (O.):—"Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport be to direct the doing of anything which the Legislature deems to be for the public good, or to prevent or punish the doing of anything which it deems to be contrary to the public good; and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act, and of the provision or enactment, according to the true intent, meaning and spirit thereof."

[IN THE COURT OF APPEAL.]

FOSTER V. ANDERSON.

C. A.

1908

April 21.

Vendor and Purchaser—Contract for Sale of Land—Time of Essence—Time for Completion—Delay of Purchaser—Default of Vendor to Tender Conveyance—Duty as to Preparation—Misdescription of Land—Statute of Frauds—Misrepresentation—Mistake—Specific Performance.

The contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, *inter alia*, the following provisions: "This offer to be accepted by September 25th, A.D. 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense:"—

Held, that time was of the essence as to all the terms of the contract; but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted; and, having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance.

Among the words of description of the parcel of land in question, the contract contained the words, "being the premises known as number 22 Ann street." The correct number was 24; there was no number 22; and the defendant owned no other property in Ann street:—

Held, that there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds; OSLER, J.A., *dubitante*.

Held, also, upon the evidence, that misrepresentation and mistake such as would afford ground for refusing specific performance were not shewn.

Judgment of a Divisional Court, 15 O.L.R. 362, awarding specific performance, affirmed.

An appeal by the defendant from the judgment of a Divisional Court, 15 O.L.R. 362, reversing the judgment of Riddell, J., at the trial, and awarding the plaintiff (purchaser) specific performance of a contract for the sale and purchase of land.

The appeal was heard by MOSS, C.J.O., OSLER, GARROW, MACLAREN, J.J.A., and ANGLIN, J., on the 18th and 19th February, 1908.

G. H. Watson, K.C., and F. J. Roche, for the defendant. Specific performance should not have been ordered. The defendant does not charge the agent with fraud, but with a material misrepresentation. It may have been an innocent one, and yet sufficient to prevent the enforcement of the contract: *Drysdale v. Mace* (1854),

- C. A. 5 De G. M. & G. 103; *Tamplin v. James* (1880), 15 Ch. D. 215;
 1908 *Wilde v. Gibson* (1848), 1 H.L.C. 604, 632; *Mullens v. Miller* (1882),
 FOSTER 22 Ch. D. 194; *Adam v. Newbigging* (1888), 13 App. Cas. 308.
 v. The trial Judge does not find fraud, but he makes no finding as
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 should now find that the misrepresentation was a material one,
 and that the defendant acted under a mistake in respect of it.
 Time was of the essence of the contract; the circumstances of
 the case require that the contract should be so interpreted: *Hudson*
v. Temple (1860), 29 Beav. 536; *Hipwell v. Knight* (1835), 1 Y.
 & C. Ex. 401, 416; *Venn v. Cattell* (1872), 27 L.T.R. 469; *Gray*
v. Smith (1889), 43 Ch. D. 208, 214; *Lloyd v. Collett* (1793), 4 Bro.
 C.C. 469; Pomeroy on Contracts, ed. of 1897, p. 472; *Brooke v.*
Garrod (1857), 3 K. & J. 608, 2 De G. & J. 62; *Parkin v. Thorold*
 (1852), 16 Beav. 59; *Oakden v. Pike* (1865), 34 L.J. Ch. 620; *Wallace*
v. Hesslein (1898), 29 S.C.R. 171; *Robinson v. Harris* (1892), 19 A.R.
 134; *Harris v. Robinson* (1892), 21 S.C.R. 390; *Crossfield v. Gould*
 (1883), 9 A.R. 218; *Nason v. Armstrong* (1894), 21 A.R. 183; *Arm-*
strong v. Nason (1895), 25 S.C.R. 263. The performance of the
 contract has been waived: *Dalrymple v. Scott* (1892), 19 A.R. 477;
Johnstone v. Milling (1886), 16 Q.B.D. 460. In the absence
 of agreement to the contrary, the purchaser must prepare and
 tender the deed: *Mooney v. Prevost* (1873), 20 Gr. 418; *Boulton*
v. Hugel (1874), 35 U.C.R. 402, 407; *Stevenson v. Davis* (1893),
 23 S.C.R. 629. In the Court below the Chancellor relies on
Upperton v. Nickolson (1871), L.R. 6 Ch. 436, 443, and *Price v.*
Williams (1836), 1 M. & W. 6, 13; but the words used are different,
 and these cases are not binding on this Court. As to delay, see
Bradley v. Elliott (1906), 11 O.L.R. 398, 402; *Burns v. Boyd* (1860),
 19 U.C.R. 547; *Denny v. Hancock* (1870), L.R. 6 Ch. 1. The
 defendant is not in default. There is here no act or omission
 which leaves her subject to criticism as to good faith or proper
 conduct. There is not a sufficient description of the lands in the
 contract. See *Knapp v. Carley* (1904), 3 O.W.R. 940; *McClung*
v. McCracken (1882-3), 2 O.R. 609, 3 O.R. 596; *McCarthy v.*
Cooper (1885), 12 A.R. 284. There is a discretion in the Court
 to refuse to award specific performance, and it should be exer-
 cised in this case: *Harris v. Robinson*, 21 S.C.R. 390; *Coventry*
v. McLean (1892), 22 O.R. 1; *Lamare v. Dixon* (1873), L.R. 6

H.L. 414; *Walker-Parker Co. v. Thompson* (1906), 7 O.W.R. 125; *Murray v. Jenkins* (1898), 28 S.C.R. 565; *Sweeney v. Coote*, [1906] 1 I.R. 51, 101. The defendant was also under a mistake as to the circumstances, and so much so that the plaintiff will not order her to convey her property: on this we refer to the correspondence and evidence. As a matter of fact, the property was not vacant, though she thought it was.

A. H. Marsh, K.C., and *W. J. Clark*, for the plaintiff. The defence of mistake is now heard of for the first time. If there was any mistake, it was not patent, it was unilateral, and was not induced by the plaintiff. Such a mistake will be a defence only when the conscience of the Court is shocked. See *Tamplin v. James*, 15 Ch. D. 215; *Van Praagh v. Everidge*, [1902] 2 Ch. 266. The alleged misrepresentation was immaterial, and had nothing to do with the defendant's attempt to get free from her contract. If there was any misrepresentation, it was made by the defendant's own agent, and the plaintiff had nothing to do with it. But there was in fact no misrepresentation at all, as was determined by the trial Judge. Time was not made of the essence of the contract in question. It is true that time was expressly made of the essence of the offer, but it was not made of the essence of the contract, which would come into existence upon the offer being accepted. At common law time is always of the essence of the contract, but in equity it is not so, unless the subject matter of the contract is such that the Court will read into the contract an implication that time is to be of the essence, or, unless, upon the face of the contract, it is most clearly, unequivocally, and unmistakably shewn by the stipulation that time is to be of the essence: *Parkin v. Thorold*, 16 Beav. at p. 65; *Pomeroy on Contracts*, 2nd ed., secs. 390, 392; *Sugden on Vendor and Purchaser*, 14th Eng. ed., ch. 6, sec. 111, paragraph 13; *Webb v. Hughes* (1870), L.R. 10 Eq. 281, 286; *Crabbe v. Little* and *Moses v. Little* (1907), 14 O.L.R. 631; *Bowerman v. Fraser* (1907), 10 O.W.R. 229, 232. The latter case was subsequently reversed by the Court of Appeal upon another point, but the question of time being of the essence was not touched upon: (1907), 10 O.W.R. 729. The delay was not caused by the plaintiff. The Statute of Frauds has been satisfied by the written contract and the oral evidence, which was admissible to identify the land: *Plant v.*

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Bourne, [1897] 2 Ch. 281. Here No. 24 Ann street is the only land in the city of Toronto owned by the defendant, and it is the only land about which the parties negotiated, and the oral evidence shews that it is the property which the defendant intended to sell, and that there is no such property as No. 22 Ann street. An undelivered conveyance is sufficient evidence of a contract of sale in order to satisfy the statute: *McCarthy v. Cooper* (1884-5), 8 O.R. 316, 12 A.R. 284. If necessary, the deed might be reformed to shew the real terms of the contract, and specific performance given in the same action; but see *Green v. Stevenson* (1905), 9 O.L.R. 671, 675, 676. The judgments in the Divisional Court give good reasons for holding that it was the duty of the vendor and not of the purchaser to tender the conveyance. It is not a condition precedent to the right to maintain an action for specific performance that the plaintiff should before action tender either a conveyance or the purchase money. No tender is ever necessary when the facts shew that a tender would not have been accepted if it had been made. If any tender was necessary, the vendor should have made the tender of the conveyance, according to the custom here.

Watson, in reply, referred to some of the cases cited for the plaintiff, and also to *Dempster v. Lewis* (1903), 33 S.C.R. 292.

April 21. Moss, C.J.O.:—Appeal by the defendant from a judgment of a Divisional Court reversing the judgment delivered by Riddell, J., after trial without a jury. The action is for specific performance of an agreement for sale to and purchase by the plaintiff of a parcel of land situate on Ann street, in the city of Toronto. The agreement is set out in the judgment of the learned trial Judge, reported 15 O.L.R. 362, 364.

He was of opinion that time was expressly made of the essence of the contract, and that the plaintiff had made default in performing his part of the contract within the limited time, and on that ground dismissed the action.

In the Divisional Court (15 O.L.R. 362, 370) the Judges differed in their views with regard to time being of the essence. The Chancellor inclined to the opinion that time was not made of the essence, but he did not base his decision on that ground. He held that the plaintiff was prevented by the defendant's conduct

from carrying out the contract within the time limited for completion. Magee, J., was of opinion that time was of the essence of the contract, but agreed with the Chancellor that the defendant was responsible for the non-completion within the time. Mabee, J., was of opinion that time was not of the essence, and that the plaintiff had done all that he was required to do in order to entitle him to maintain the action.

There were other defences, one being that the defendant had been induced to accept the plaintiff's offer by a misrepresentation made to her as to the condition and state of the property. This defence was rejected by the learned trial Judge on the evidence, and his finding was affirmed by the Divisional Court. There appears to be no good reason for questioning the concurrent conclusions of these Courts in this respect.

The next defence was that the contract was not duly evidenced in writing within the terms of the Statute of Frauds, and as to this the Divisional Court was unanimously of the opinion that it could not prevail. The result was that the appeal was allowed, and the defendant was ordered to specifically perform the agreement.

Upon argument of the appeal, the same grounds were taken as in the Courts below.

Upon the point whether upon the true construction of the agreement time is to be deemed as of the essence, there has been much diversity of opinion. The same question arose upon an agreement almost in the same words in the cases of *Crabbe v. Little* and *Moses v. Little*, 14 O.L.R. 631, and Mabee, J., was of opinion, as he was in this case, that the words "time shall be of the essence of this offer" were to be confined to the time of acceptance of the offer, and did not extend to the agreement when accepted by the party to whom it was addressed. In those cases it was not material to determine the point, for it was clear that the vendor by his conduct had treated time as not material.

In *Bowerman v. Fraser*, 10 O.W.R. 229, Britton, J., without referring to *Crabbe v. Little* and *Moses v. Little*, expressed the same view as Mabee, J., upon an agreement in the same form. That case came to this Court, where the decision was reversed on other grounds, no opinion being expressed on this point: 10 O.W.R. 729.

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In none of these cases was any reference made to the provision in the offer, to which Magee, J., directs attention in this case, fixing a day (the 25th September), by which the offer was to be accepted, otherwise it was void. It is also not to be overlooked that it was quite open to the plaintiff to withdraw his offer at any moment before acceptance by the defendant, so that it was unnecessary to stipulate for time being of the essence of the acceptance. What was evidently intended was that time was to be of the essence when the offer was accepted.

The application to an agreement for the sale of land of the provision making time of the essence is of so frequent and common occurrence that it can hardly be supposed that the words employed in this instance were understood by either party in the limited sense which is now sought to be attributed to them. The offer contained all the material terms of an agreement for the purchase and sale of the land. All that was needed to make an agreement binding on the plaintiff was an acceptance, either in writing or orally; and, although when accepted it ceased technically to be any longer an offer, it is reasonable to conclude that these words continued to relate to every term of the concluded agreement to which time as the essence of the contract might be appropriately applied.

But, as pointed out by the Chancellor and Magee, J., this conclusion does not aid the defendant, for, having regard to her own default, she is not in a position to insist upon the stipulation as to time.

Notwithstanding the doubt expressed by Patterson, J.A., in *McDonald v. Murray* (1885), 11 A.R. 101, at p. 125, it may be accepted that, as a general rule, it is the purchaser's duty, as well as his privilege, to prepare the conveyance and tender it for execution: *Stevenson v. Davis*, 23 S.C.R. 629, at p. 633. But, as pointed out in that case by Sir Henry Strong, C.J., that is only so in cases in which the agreement of the parties has not made some other provision. In the present case other provision was made, and the solicitors understood that, inasmuch as the conveyance was to be prepared at the expense of the vendor, the effect was that the vendor was to prepare it. And this view seems consonant with the authorities.

Without repeating the grounds stated by the Divisional Court,

it is sufficient to say that the defendant's failure to comply with this condition, or, rather, the failure to communicate to the plaintiff's solicitor that the conveyance had been executed and was ready for delivery upon payment of the part of the purchase money to be paid in cash, and the handing over of the mortgage securing the balance, prevented the plaintiff from completing the purchase according to the terms of the agreement.

The objection on the ground of misrepresentation has been already dealt with.

The next and last ground of defence is that based upon the Statute of Frauds. Among the words of description of the parcel, the agreement contains the words, "being the premises known as number 22 Ann street." But, upon the evidence, these appear to be words of misdescription. According to the evidence, the premises were not known to any one as number 22 Ann street. The correct number is 24, and the premises are known as number 24 Ann street. There is no number 22 Ann street, and the defendant owns no other property on Ann street, or, indeed, in the city of Toronto, and she knew that the offer referred to her property, and she signed the acceptance with that understanding. There is sufficient description to identify the parcel without the aid of the street number, and it may well be rejected as unnecessary surplusage. And for the reasons given and the authorities referred to by the Divisional Court, the objection fails.

The appeal should be dismissed with costs.

OSLER, J.A.:—I agree in the result, though not without some hesitation on the question whether the Statute of Frauds does not afford a defence to the action. On the facts as to this, the case differs from any case which has been cited or which I have been able to discover, the principles of which have been thought applicable. My doubt, however, is not strong enough to induce me to dissent from the unanimous opinion of the other members of the Court.

ANGLIN, J.:—The defendant appeals from the judgment of a Divisional Court reversing the judgment of Riddell, J., and, at the suit of the purchaser, decreeing specific performance of an

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agreement for the sale of a house and lot situate on the north side of Ann street, in the city of Toronto.

The plaintiff made an offer in writing to purchase this property through the agent of the defendant. The offer was sent by the agent to the defendant, then residing in the city of Austin, in the State of Texas, and was accepted by her in writing and returned to the agent in Toronto. Almost immediately after mailing her acceptance, the defendant received some information concerning the tenancy of the property which caused her to rue her bargain, and, on the following day (29th September), she caused her daughter to write to her agent and also to her solicitor that she intended to withdraw from the agreement for sale to the plaintiff.

The executed agreement reached the agent in due course, and was at once communicated by him to the plaintiff, whose solicitor, on the 4th October, wrote to the defendant's solicitor asking him to submit a draft deed, so that he might make an investigation of title. Having received no reply, the plaintiff's solicitor again wrote on the 8th October, enclosing a draft mortgage for approval, and again asked for the submission of a draft deed. About this time, or shortly before, the defendant's solicitor informed the plaintiff's solicitor that the defendant "claimed" that she had been induced to sign the agreement under a misapprehension of fact or a misrepresentation by Mr. Hill, her agent. The plaintiff's solicitor, in reply, intimated that the plaintiff had not been a party to any misrepresentation, and must insist upon the contract being carried out. On the 8th October requisitions on title were formally made on behalf of the plaintiff, and on the 10th October the plaintiff's solicitor wrote to the defendant's solicitor enclosing a deed in duplicate for execution by the defendant. This was the date fixed by the contract for closing the transaction. In the meantime the defendant's solicitor had himself prepared a deed of the property in favour of the plaintiff, in duplicate, and had sent the same to his client in Texas. In due course he received these instruments back duly executed. But of this fact the plaintiff's solicitor was not informed. On the 20th October the plaintiff's solicitor wrote to the defendant's solicitor stating that the latter had had time enough to communicate with his client, and that unless the sale was carried out by Tuesday the 23rd instant, he must bring action for specific per-

formance. On the 22nd October the defendant's solicitor wrote stating that he had, on the 3rd October, informed the plaintiff's solicitor by telephone that the defendant "claimed" she had been led to execute the contract by misrepresentation, and would not carry it out unless compelled to do so. He added that he would at once ask his client for instructions to accept service of writ. On the 24th October, at the request of the plaintiff's solicitor, the defendant's solicitor wrote acknowledging that he was the duly authorized solicitor of the defendant in Ontario, and that he had in that capacity received from the plaintiff's solicitor a draft deed on the 10th October, but declining to admit tender of purchase money. On the 30th October the plaintiff's solicitor again wrote, tendering with his letter \$1,500 in legal tender and a mortgage executed by the plaintiff for \$4,000. The tender was refused, and this action was begun on the 15th November.

The offer to purchase contained, *inter alia*, the following provisions: "This offer to be accepted by September 25th, A.D. 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." . . . "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense." The acceptance by Mrs. Anderson is dated the 25th September, 1906.

For the vendor, resisting specific performance, counsel contended:—

1st. That time is of the essence of this contract, and that the purchaser having failed to tender a deed for execution by the vendor in time to permit of the sale being closed on the date fixed, and having failed to tender his purchase money on or before that date, he is not entitled to specific performance.

2nd. That the defendant's acceptance was induced by a misrepresentation made by Mr. Hill, viz., that the offer was sent with the approval and by the advice of Mr. McCullough, the vendor's solicitor.

3rd. That, when accepting, the vendor was under the mistaken impression that the property was vacant, and that it would require extensive repairs before a new tenant could be secured; whereas in fact the premises were well rented.

4th. That the property is described in the agreement as No. 22 Ann street, whereas in fact it is No. 24 Ann street, and the

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Statute of Frauds is a bar to rectification and specific performance.

Although Mr. Marsh very strenuously maintained that time was made of the essence only as to the period fixed for acceptance of the offer, I do not think that this view is tenable. The offer states the date for completion as well as that for acceptance, and it is of the offer as a whole, *i.e.*, as to all the terms in regard to time, that the purchaser proposes that time shall be of the essence. This proposal the vendor accepted, covenanting, promising, and agreeing that she would "duly carry out the same on the terms and conditions above mentioned." I think it is reasonably clear, therefore, that time was of the essence of all the terms of the contract.

But, while this is so, the contract imposes obligations on both parties which must be fulfilled by each in the order in which they arise. The duty of the purchaser to make tender of his purchase money does not arise until the vendor has done that which it is incumbent on her to do to put herself in a position to complete the sale. Before this can be done, the conveyance must be prepared, and the first question for determination appears to be, upon whom did the duty of preparing the deed and submitting the same for approval devolve under the provisions of this contract? Ordinarily this duty, or privilege, whichever it is, belongs to the purchaser: *Stevenson v. Davis*, 23 S.C.R. 629, 633. This contract stipulates that the deed shall be prepared at the expense of the vendor. Although the rule as to the duty of preparing the lease under a contract for lease, silent as to its preparation, may not be the same as that with regard to the preparation of the deed under a contract for sale likewise silent (*Cantley v. Powell* (1876), Ir. R. 10 C.L. 200), the case of *Price v. Williams*, 1 M. & W. 6, which appears to have been accepted by all the authorities on conveyancing as laying down a rule universally acted upon ever since it was decided in 1836, sufficiently establishes that where an agreement for sale provides that the conveyance is to be prepared at the expense of the vendor, that circumstance suffices to render inapplicable the ordinary rule that the purchaser is entitled and is expected to prepare his own assurance. This the vendor failed to do. Though her solicitor held an executed conveyance, procured by him, apparently with the view that he

might carry out the transaction if he should conclude that the defendant was compellable to do so, he failed to communicate this fact to the purchaser's solicitor, or to submit to him a draft conveyance for approval, as demanded by the letters of the 4th and 8th October. This default of the vendor precludes her from setting up any default of the purchaser as to payment of the purchase money or delivery of the mortgage, because his obligation to perform these terms would arise subsequently to the unfulfilled duty of the vendor to prepare and submit the conveyance for approval. It is, therefore, perhaps unnecessary to determine whether time was or was not of the essence of the contract, because, if it were so, the vendor's prior default operated as a waiver of any such stipulation enuring to her benefit. In default herself in respect to a duty, the performance of which was a condition precedent to the purchaser becoming bound to tender the money and mortgage which he should give to complete the sale, the vendor cannot set up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim.

The trial Judge has found—and the Divisional Court has affirmed his finding—that there was no misrepresentation in fact. The evidence certainly does not warrant this Court in reversing these concurrent findings of fact. Moreover, the defendant's admission, upon her examination for discovery, that she would not carry out the sale because "the cash payments were too small," and because she did not like the arrangement and did not wish to carry it out, indicate sufficiently that she was not influenced to attempt to withdraw her acceptance by the discovery of any misrepresentation, and that, in fact, she had not been induced or influenced by what is now said to have been a misrepresentation to accept the plaintiff's offer.

Then the alleged mistake—*i.e.*, that the defendant believed the property to be vacant and suffering dilapidation, whereas in fact it was well tenanted—if it would suffice as a defence—is by no means satisfactorily established. Moreover, if such a mistaken impression did exist in fact, it is shewn by the passage from the examination for discovery already adverted to, by her prior acceptance of the McGlashen offer in precisely the same terms, by her admitted reason for cancelling her acceptance of that offer, and by her readiness to accept the plaintiff's offer, that the defen-

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dant's acceptance was not induced by the mistake; neither did its discovery—if there was any such discovery in fact—influence the defendant's attempted cancellation of her acceptance. It seems to me more than doubtful if the defendant was, in fact, labouring under the alleged mistake when she accepted Foster's offer; and it seems quite clear that her acceptance was not induced by such mistake.

The misdescription of the property, as No. 22 Ann street, in lieu of No. 24 Ann street—the correct street number of the plaintiff's house, according to the evidence before us—would, perhaps, present a serious difficulty if this were the only description in the agreement, and if it were necessary to reform that document before decreeing specific performance: *Green v. Stevenson*, 9 O. L.R. 671.

But we have here a contract complete in its terms, and containing the following unusually full description of the property: "All and singular the premises situate on the north side of Ann street, in the city of Toronto, being the premises known as number 22 Ann street, having a total frontage of 140, viz., 89-8, 50 feet, more or less, by a depth of about 113 for the 89-8 frontage and 92 for the 50 feet frontage, more or less." The conformation of the piece of land thus described is so peculiar that, with the addition of the statement that it is situate on the north side of Ann street, were the street number entirely omitted, there could not be the slightest difficulty in identifying the property with which the parties were dealing. We have added to this the fact that there was no other property on Ann street known as No. 22. I think we may, therefore, reject as surplusage the words "being the premises known as No. 22 Ann street." Without these words the agreement is well within the line of authorities of which *Plant v. Bourne*, [1897] 2 Ch. 281, is, perhaps, the most in point, shewing that where there is a description such that, with parol evidence of the circumstances in which it was employed, the subject of the agreement can be identified, the requirements of the Statute of Frauds are met, and the defendant may be compelled to specifically perform the contract. Here the parol evidence puts it beyond doubt that the property which the parties intended to deal with was No. 24 Ann street, and the description, read in the light of that evidence, identifies it with legal certainty.

Then the words are, "known as No. 22 Ann street." While this property may have been known to the plaintiff only as No. 24 Ann street, it is quite possible that it may have been known to others as No. 22 Ann street. In fact, the atlas in common use amongst estate agents and conveyancers in Toronto shews this property as No. 22. But this fact is not in evidence before us, and cannot be considered now, though, if necessary, leave might very properly be given to shew it. Indeed, the insertion of the number 22 in the agreement is probably thus to be accounted for.

Moreover, the property has a frontage on Ann street of 140 feet. The street numbers on the north side of Ann street are, according to the plaintiff's evidence, 2, 24, and 40. If there were a number 22 on the street, it would probably be assigned to a part of this property.

But, applying the maxim, "*falsa demonstratio non nocet*," we should, in my opinion, discard the words, "being the premises known as No. 24 Ann street," and, with these words removed, all difficulty under the Statute of Frauds disappears: *Doe Smith v. Galloway* (1833), 5 B. & Ad. 43, 51; *Cowen v. Truefitt*, [1899] 2 Ch. 309, 311; *Morrell v. Fisher* (1849), 4 Exch. 591, 604; *Doe Hubbard v. Hubbard* (1850), 15 Q.B. 227, 241.

I would, therefore, dismiss the defendant's appeal with costs, and would affirm the judgment of the Divisional Court.

GARROW and MACLAREN, JJ.A., concurred.

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RE MITCHELL AND THE MUNICIPAL CORPORATION OF CAMPBELLFORD.

April 9.

Municipal Corporations—Local Option By-law—Motion to Quash—Adoption by Electors—Voters' Lists—Finality of—Meaning of "Scrutiny"—7 Edw. VII. ch. 4, sec. 24 (O.).

In voting on a local option by-law, under the Liquor License Act, which requires the assent of the electors before the final passing thereof, the voters' lists, when revised and certified by the Judge, under the Ontario Voters' Lists Act, 7 Edw. VII. ch. 4, sec. 24, are (with certain exceptions specified in the section) final and conclusive evidence that all persons named therein, and no others, are qualified to vote on the by-law.

Voting on such a by-law is an "election," and a motion to quash the by-law is a "scrutiny," within the meaning of the 24th section.

Re Cleary and the Township of Nepean (1907), 14 O.L.R. 392, not followed.

THIS was an application to quash a local option by-law of the municipal corporation of Campbellford.

The motion was heard by CLUTE, J., in the Weekly Court at Toronto, on the 6th April, 1908.

James Haverson, K.C., and *A. B. Colville*, for the applicant.

G. H. Watson, K.C., for the corporation.

April 9. CLUTE, J.:—Motion to quash local option by-law No. 482 of the municipal corporation of Campbellford.

The principal question involved in this application is as to the finality of the voters' lists. Mr. Haverson contends that he has the right to inquire into the qualification of the voters, and that on a motion to quash a by-law of this kind the lists are not final.

The Liquor License Act, R.S.O. 1897, ch. 245, sec. 141, sub-sec. 1, provides that the council of every township, city, town, and incorporated village, may pass by-laws for prohibiting the sale of liquor, provided that before the final passing thereof, the by-law has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act. 6 Edw. VII. ch. 47, sec. 24, sub-sec. 4, provides that the by-law is to be finally passed if approved by three-fifths of the electors voting.

Turning then to the Municipal Act, 1903, ch. 19, under Part VI.—"Title II. respecting By-laws, Division III. Voting on By-laws," sec. 338 provides, in case a by-law requires the assent of the electors before the final passing thereof, what proceedings are to be taken

for ascertaining such assent. Section 351 provides that the proceedings at the poll, and for and incidental to the same and the purposes thereof, shall be the same, as nearly as may be, as at municipal elections, and all the provisions of secs. 138 to 206 inclusive, (except sec. 179 of the Act), shall apply to the taking of votes at the poll and to all matters incidental thereto.

Section 148, which is thus brought in, and which is applicable to an election of this kind, provides that the proper list of voters to be used at an election shall be the first and second parts of the last list of voters certified by the Judge under the Voters' Lists Act.

The Voters' Lists Act, 1907, 7 Edw. VII. ch. 4, provides for making up these lists and their revision by the county Judge. Section 14, sub-sec. 4, declares that the decision of the Judge in regard to the right to vote, or as to the right to enter on or strike from the list the name of any person as a voter, shall be final. Section 24 provides that the certified list shall, upon a scrutiny under the Ontario Election Act, or the Municipal Act, be final and conclusive evidence that all persons named therein, and no others, were qualified to vote at any election at which such list was used, or was the proper list to be used; with certain exceptions which do not affect this case.

Section 89 of the Municipal Act provides that no person shall be entitled to vote at any election unless he is one of the persons named or intended to be named in the proper list of voters; and no question of qualification shall be raised at any election, except to ascertain whether the person tendering his vote is the person intended to be designated in the list of voters.

Section 369 provides for a scrutiny.

Mr. Haverson urged that sec. 24 of the Voters' Lists Act only applies to a "scrutiny" as defined by sub-sec. 2 of sec. 2 of that Act, which reads: "'Scrutiny' as meaning any scrutiny of the votes polled at an election within the meaning of sec. 76 and the next succeeding nine sections of the 'Ontario Controverted Elections Act.'" In that Act (R.S.O. ch. 11, sec. 2, sub-sec. 3) election means an election of a member to the Legislative Assembly.

It is plain, therefore, that that limited meaning cannot be given to "scrutiny" under the Municipal Act as provided in said sec. 24.

It is further urged on behalf of the applicant that voting on a by-law is not an "election," and a motion to quash is not a scrutiny,

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and therefore the clauses relating to the finality of the voters' lists on the question of qualification of the voters do not apply, and that the applicant in a case of this kind has the right to make inquiry as to the qualification of voters notwithstanding that Act.

In support of this view it is further urged that sec. 86 of the Municipal Act gives the qualifications of voters, and no person who does not fill one of these qualifications is entitled to vote on this by-law.

I am unable to accede to this argument. In my opinion the effect of the enactments above referred to is to make the voters' lists final as determining the qualification of voters. When once the Municipal Act applies and the voters' lists are brought in as the lists to be used to designate the persons who are entitled to vote, such lists are not to be dissociated from the quality of finality, which the Act gives them, and which was the chief cause of their being. They have, so to speak, the quality of finality as an integral part of them. They indicate the persons entitled to vote in such manner that their qualification cannot be further inquired into. They are not lists under the Act, if stripped of this essential quality. See *In re Port Arthur and Rainy River Prov. Election*, *Preston v. Kennedy* (1907), 14 O.L.R. 345; *Re Saltfleet Local Option By-law* (1908), 16 O. L. R. 293; *Reg. ex rel. McKenzie v. Martin* (1897), 28 O.R. 523; *In re Armour and the Township of Onondaga* (1907), 14 O.L.R. 606, 608.

I am not able to follow Mabee, J., in *Re Cleary and the Township of Nepean* (1907), 14 O.L.R. 392.

The weight of authority is, I think, the other way; and, having regard to the various statutory enactments above referred to, I am of opinion that the qualifications of voters are fixed by the lists, from which there is no further appeal.

The question of the right of deputy returning officers and poll clerks to vote was not pressed, owing to the recent decision in *Re Joyce and Township of Pittsburg* (1908), 16 O.L.R. 380.

It was admitted by Mr. Haverson that if the voters' lists were final he could not hope to succeed.

The motion to quash is dismissed with costs.

[IN CHAMBERS.]

REX EX REL. O'SHEA v. LETHERBY.

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April 6.

Municipal Corporations—Election—Declaration of Qualification—Invalidity—Property Qualification—Joint Assessment—Fixed Assessment—including School Taxes—Invalidity of By-law—Conflicting Interest—Contract with Corporation—Corrupt Practices—Evidence—Powers of Master in Chambers—Con. Mun. Act, 3 Edw. VII. ch. 19, secs. 129 (3a), 204, 311, 93, 591 a (g), 219 (2), 232, 248.

The Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, sec. 129 (3a), as amended by 4 Edw. VII. ch. 22, sec. 4, requires every candidate for the office of mayor or councillor in a town to file in the office of the clerk of the municipality a statutory declaration of qualification in accordance with the form contained in sec. 311 of the Act or to the like effect, in default of which such candidate shall be deemed to have resigned and his name shall be removed from the list of candidates. By 6 Edw. VII. ch. 34, sec. 10, sub-secs. 1 and 2, the form of declaration is amended by adding to it statements that the candidate is "not a citizen or subject of any foreign country," and that the estate in respect of which he qualifies is assessed in his name, or in the name of his wife, on the last revised assessment roll of the municipality, to the value specified in the declaration. Neither of these requirements was complied with in the declarations filed by the persons elected as mayor and councillors of a town:—

Held, that the omission of these statements rendered the declarations invalid, and could not be cured by virtue of sec. 204 of the Act, and that the persons elected must be deemed to have resigned their offices.

Semble, that the declaration of qualification is invalid if made before the town clerk.

A councillor was jointly assessed with five other persons as tenant of a property assessed at \$6,780, so that his one-sixth share was less than \$1,200, being the amount required by sec. 76, sub-sec. 1 (b), read in connection with sec. 93 of the Act:—

Held, that the qualification was insufficient.

Principle of *Reg. ex rel. Harding v. Bennett* (1896), 27 O.R. 314, applied.

A councillor was a member of a partnership to which the town had assumed to grant by by-law a fixed assessment "for all purposes, including school taxes":—

Held, that such agreement was *ultra vires* of the corporation under sec. 591 a, clause (g), of the Municipal Act, that the partnership firm was liable to an action by the corporation to have the proper school rates levied upon the true assessable value of the property, and that the councillor's qualification was insufficient.

Reg. ex rel. Macnamara v. Heffernan (1904), 7 O.L.R. 289, followed.

A councillor had done work for the school board which had to be done to the satisfaction of the town engineer, the account for which was not passed and paid until February, 1908:—

Held, that as a member of the council he was in a position where his duty might conflict with his interest, and must therefore be disqualified.

The mayor, as a member of the Citizens' League, had entered into a contract with the corporation, under an indemnity given by the league as to certain costs, by which he was apparently liable for the sum of \$19.66:—

Held, that he was thereby disqualified, and that to such a case the principle "*de minimis non curat lex*" does not apply.

Nell v. Longbottom, [1894] 1 Q.B. 767, followed.

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In proceedings instituted under the Municipal Act to unseat a member of the municipal council, the Master in Chambers has power under sec. 248, as interpreted by sec. 219, sub-sec. 2, of the Act, to direct evidence as to alleged corrupt practices to be taken before a county court Judge.
Reg. ex rel. Whyte v. McClay (1889), 13 P.R. 96, followed.
Rex ex rel. Beck v. Sharp (1908), 16 O.L.R. 267, distinguished.

THIS was a motion to remove the mayor and the six councillors of the town of Midland from their respective offices on grounds referred to in the judgment.

The motion was argued on March 5th, 1908, before Mr. CARTWRIGHT, the Master in Chambers.

J. B. Mackenzie, for the relator.

F. E. Hodgins, K.C., for the mayor (Mr. Letherby).

W. A. Finlayson, for the councillors.

April 6. THE MASTER IN CHAMBERS:—The nomination was held on 30th December last, when the respondents other than Letherby were the only candidates for the office of councillor who assumed to comply with sec. 129 (3a) of the Municipal Act; and they were accordingly declared elected on the following day.

The mayor was elected after a contest, in which he polled 344 votes against 250 given for his opponent.

The respondent Wallbridge has disclaimed. He was clearly disqualified, being a member of the school board. He asks to be relieved from costs; but, in view of the decision in a similar case from Midland (*Rex ex rel. Jamieson v. Cook* (1905), 9 O.L.R. 466), he must pay costs, which I fix at \$10.

All the other respondents are said to be disqualified because they did not make the declaration required by sec. 129 (3a).*

In the case of *Rex ex rel. Milligan v. Harrison* (1908), 11 O.W.R. 554, I was of opinion that, though these declarations were defective, they might be cured by virtue of sec. 204. But I am informed by the counsel engaged in that case, on the appeal from my decision, that Chief Justice Meredith expressed a decided opinion to the contrary.

It was argued by Mr. Mackenzie that this declaration is to be "in accordance with the form contained in sec. 311 of this

* The effect of this sub-section as amended, and of 6 Edw. VII. ch. 34 sec. 10, sub-secs. 1 and 2, is stated in the headnote.

Act or to the like effect." By 6 Edw. VII. ch. 34, sec. 10, subsecs. 1 and 2, that form is amended in two respects. But neither of these was complied with in any of the declarations made by the respondents. It must therefore follow that they are to be deemed to have resigned just as if they had not filed any declaration at all.

It was further argued that these declarations were invalid because (with the exception of that of Campbell) made before the town clerk.

It was held in *Rex ex rel. Milligan v. Harrison*, ante p. 477, that sec. 315 does not apply to these declarations. Nor is any assistance given by secs. 316 and 317, because any declaration made thereunder is to be retained by the official taking same, whereas under sec. 129 (3a) the candidate is to file it himself at once in the office of the clerk. It would, therefore, seem that on this further ground the declarations were invalid, and the respondents must be declared not duly elected. The town clerk, in his evidence, stated that he was a commissioner for taking affidavits; but no proof was given of this, nor did he assume to act in that capacity. If the declarations were invalid, there is no necessity for considering the objections made to the respondents severally. But, in case my opinion as to the declarations is incorrect, it will be safer to deal with some of the other points raised by Mr. Mackenzie, and enforced with his proverbial industry and fulness of detail.

(1) To McMurtry there is no special exception taken.

(2) The respondent William Simpson certainly seems not to have the necessary property qualification. He is jointly assessed with five other persons as tenant of a property owned by Stafford, and which is assessed only at \$6,780. This seems clear from sec. 93 of the Municipal Act, and the decision in *Reg. ex rel. Harding v. Bennett* (1896), 27 O.R. 314, on that section. On this ground he should be unseated, with costs.

(3) The respondent Hanly must also be unseated. He is (as he admits in his affidavit filed in answer to this motion) a member of the partnership known as the Midland Engine Works. The town of Midland, by a by-law, No. 654, passed on 11th September last, and taking effect on 1st January, 1908, has assumed to grant this firm a fixed assessment of \$5,000, which, it is said,

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"shall be for all purposes, including school taxes, and shall include business tax."

It was, perhaps, owing to the passing of the Act of 3 Edw. VII. ch. 65 (O.), which enacted that Messrs. Chew Brothers should have a fixed assessment "for all purposes, including school rates," that it was thought to be within the power of this same corporation to make a similar contract in this case. But certainly such agreement is *ultra vires* and ineffective, under 3 Edw. VII. ch. 19, sec. 591a, clause (g), unless ratified by the Legislature, as in the case of the Chew Brothers.

It therefore appears that the respondent's firm is liable to an action by the corporation to have the proper school rates levied on the true assessable value of the property exempted, even if the by-law is not altogether bad. This respondent is therefore in a position similar to that of the respondent in *Rex ex rel. Macnamara v. Heffernan* (1904), 7 O.L.R. 289.

The relation of the council to the school board is clearly pointed out in the case of *Re Toronto Public School Board and City of Toronto* (1901), 2 O.L.R. 727, affirmed in the Court of Appeal, 4 O.L.R. 468, where the cases are referred to. That of the *City of Winnipeg v. C.P.R.* (1899), 12 Man. R. 581; (1900), 30 S.C.R. 558, is especially worthy of consideration. If this is not enough, there was a further objection raised at the argument, which appeared from an examination of the municipal accounts. Two claims of the Midland Engine Works against the corporation were unsatisfied on 31st December, 1907, and were not paid until this year's council had been organised, with the respondent as a member.

(4) As to T. J. Campbell, it is admitted that on 4th July last he took out a plumber's license (to be in force until 31st December last) from the corporation, pursuant to by-law No. 539, and did work for the school board, for plumbing and heating combined, amounting to \$2,373. His tender was accepted on 30th May, 1907. By it Campbell undertook to do the work "according to Midland plumbing by-law." This had been passed on 1st June, 1903, and provided that "any person desiring to carry on business or trade as a master plumber within the limits of the town of Midland shall take out a license," but "no person shall receive such license unless he furnishes a bond binding himself to the amount of \$200, with at least two sureties in the sum of

\$100 each, to the satisfaction of the town engineer" that he will do good and proper work.

The point as to the bond was not taken at the argument, but, after finding this provision in the by-law, I directed the bond to be sent to me for inspection. In answer a letter was sent by respondent's counsel stating that no such bond had been given, and that this provision had never been enforced. Assuming that this is the fact, and that it is sufficiently proved by such letter, it might be argued that under his tender he cannot be heard to say that he never gave the bond which the by-law, so long as its validity has not been successfully attacked, requires as a condition precedent to the issue of the license, without which he could not take the contract or do any work of this kind in the town.

In any case the work had to be done to the satisfaction of the town engineer, as is admitted by counsel; and the account was not finally passed and paid until some time in February, when the balance of nearly \$1,000 was paid to the respondent.

Under these circumstances it may well be thought, and I so hold if necessary, that as a member of the council he was in a position where his duty might conflict with his interest, seeing that his work was subject to the approval of the town engineer, a servant of the council of which the respondent was a member, and able to exert an influence, even if not to put pressure on the engineer to approve of work which he ought properly to condemn.

(5) Against E. Simpson there are two further objections. It appears that his declaration, made under 129 (3a), is not signed by the town clerk, though the latter says it was made before him, but that he laid it aside and forgot to sign it. This could not possibly have occurred if the provisions of the Act as previously interpreted had been observed. It was clearly the candidate's duty to see that a proper declaration was made, and himself to file it in the clerk's office. There was also this other objection, arising from the respondent being a high school teacher of the town of Midland. By R.S.O. 1897, ch. 293, sec. 12, sub-sec. 2, half the trustees of such high school are to be appointed by the town council.

It was suggested that in this way Mr. Simpson's interest and duty might conflict, and that on this account, on well-understood principles, he ought not to be a member of the council.

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I note the point as it was raised. I do not express any opinion on it, though it does not impress me as being a very serious objection.

(6) In the case of the mayor two further objections were raised. The first was against him (in company with all the others, except Wallbridge, W. A. Simpson, and Hanly) that, as members of the Citizens' League, they had entered into a contract with the corporation, under an indemnity given by the league, as to part of the costs incurred in upholding the local option by-law of the town, up to \$100.

The matter is somewhat involved. In any case there is no evidence on which any one except Letherby could be held liable. As to him, it would seem that there is *primâ facie* a liability to the amount of \$19.66. If it were necessary to decide the motion as to him on this ground, it would seem that he would be disqualified under the authority of the *Heffernan* case, *supra*, and of *Nell v. Longbottom*, [1894] 1 Q.B. 767, which holds that in such cases the maxim "*de minimis non curat lex*" has no application. It will be open to the relator to rely on this ground in case of an appeal.

The other objection is of this nature:

As before observed, the mayor was elected after a contest. Under a by-law of the town (No. 656), it was enacted that any one who had not paid taxes "on or before 14th December shall be disqualified from voting at the municipal elections." A notice to this effect was printed on the tax bills. The list of such defaulters was made up, as required, on 14th December, and contains over 140 names. Mr. Letherby was elected by a majority of less than 100. Twenty-four of those who were on the defaulters' list afterwards paid and voted. What is stated is that the agents of Mr. Letherby took advantage of the provisions of sec. 88 of the Municipal Act, and induced voters who, as they thought, were favourable to their candidate to come and vote, and paid the taxes of some of such defaulters so as to enable them to do so. Apart from the allegation of what would clearly be a corrupt practice, I do not think the objection can succeed, as the voters were disqualified by their own act, and there was no proof offered of any voter being prevented from voting through

any ignorance or misconception of his rights under sec. 88 for which Mr. Letherby could be held responsible.

As to the allegations of such corrupt practices having taken place by the agents of Mr. Letherby, the right should be reserved to the relator to have these investigated, if the matter goes further. Under the decision in *Reg. ex rel. Whyte v. McClay* (1889), 13 P.R. 96, sec. 248, as interpreted by sec. 219, sub-sec. (2), gives the Master in Chambers power to direct the evidence on this point to be taken before the county Judge.

This question was not before Mr. Justice Anglin in *Rex ex rel. Beck v. Sharp* (1908), 16 O.L.R. 267. There only sec. 232 was under consideration, and the decision in 13 P.R., *supra*, was not referred to.

As I feel compelled to declare the whole of the respondents disqualified by reason of their defective declarations, the relator is entitled to costs against all. As against Wallbridge, who has disclaimed, these are to be limited to \$10.

I venture to repeat what I said in the *Cavers* case (see 7 O.W.R. 280), that those who are concerned in these matters and assume to take part as candidates or officials in municipal elections cannot complain if knowledge is imputed to them of at least the provisions of the Act regulating the same, and if they are dealt with accordingly.

G. G.

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May 13.

Will—Construction—Bequest to Putative Wife—Falsa Demonstratio—Solicitor's Undertaking—Failure to Fulfil—Costs.

A testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, and had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid:—

Held, that the bequest was good, and J. R. entitled to the property.

In the course of the trial the counsel and solicitor for the plaintiffs undertook that the other next-of-kin to the testator should be added as plaintiffs.

This undertaking he was unable to fulfil, as the next-of-kin referred to refused to sign a written consent thereto, as required by Con. Rule 206 (3):—

Held, that as the solicitor was unable to fulfil his undertaking through no fault of his own, and as, if he had asked for an order (subsequently made) for representation, it would have been granted, he should not be ordered to pay the costs of the action unobtainable from the plaintiffs, except those of speaking to the case after failure to add the parties.

THIS was an action for a declaration as to certain property claimed by the defendant under a will, which was tried before RIDDELL, J., at the Toronto non-jury assizes, on April 2, 1908.

The circumstances are set out in the judgment.

R. W. Eyre, for the plaintiffs, contended that the divorce was not a legal divorce, but a scheme of the defendant: *Stevens v. Fisk* (1885), Cassels' Dig., p. 235; Story on the Conflict of Laws, 7th ed., p. 263; Westlake's Private International Law, 4th ed., p. 91; *Russell v. Lefrancois* (1883), 8 S.C.R. 335.

J. F. Hollis, for the defendant.

May 13. RIDDELL, J.:—William John Switzer and Jennie Gudon intermarried in 1887, at Toronto, both being British subjects and resident in Ontario. They lived together about nine years, and had issue; then the husband went to Peterborough, then to Toronto, and finally to Chicago. Before leaving for Chicago, and in April, 1896, the husband executed a deed of separation with the wife. The husband went to Chicago, with his children, to reside with his mother, who was already living there, and, as I find, he intended to make that his permanent residence and domicile. I do not believe that he intended to return to or to take up his residence again in Canada, or that he intended ever to resume his domicile in this country. The wife was left behind

in Ontario, and, as I find, did not see her husband again, though she visited Chicago from time to time, and saw her children, and, of course, she knew that he was alive.

Some time, apparently early in 1902 a lawyer, Mr. S., practising in Chicago, called upon the husband, and wanted him to get a divorce. Switzer refused, on the ground of expense. Upon a second visit, Mr. S., the lawyer, was permitted by Switzer to apply for a divorce in his name, on condition that no fees should be charged him. Accordingly, a decree of divorce was obtained from the Chicago Court, April 3rd, 1902, and a copy sent to the wife.

She was at the time being courted by the now deceased Frank Reeves. She had told him that she could not marry him as she had a husband alive. After the receipt from Chicago in Toronto of the copy of the decree of divorce, Reeves and the divorcée went to Niagara Falls, N.Y., and there went through a form of marriage, May 24, 1902. They continued to live together as man and wife until his death on February 15, 1906. By his will he left certain property to "his wife, Jennie Reeves."

This action was brought by the father and mother of Reeves to have it declared that the defendant was not entitled to hold this property. Following the well-settled practice, I declined to go on with the trial unless all the next-of-kin, etc., were added as parties, or an undertaking given that they should be so added. The counsel (and solicitor) for the plaintiffs gave his undertaking (apparently upon the instruction of a relative of the plaintiff then in court) that all the other next-of-kin, etc., should be added as parties plaintiff. Upon this undertaking I proceeded with the case.

After delaying for some time for those to be added as plaintiffs, I was informed that the counsel (solicitor) finds it impossible to carry out his undertaking, as the parties who should have been added as parties plaintiff refused to give a written consent, as required by Con. Rule 206 (3). I thereupon made an order that the plaintiffs amend their writ and pleadings, so as to shew that they are suing not only on their own behalf, but also on behalf of all other the heirs and heiresses at law and next-of-kin of the said late Frank Reeves. This amendment has been made, and I proceed to dispose of the action.

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It is claimed that the defendant procured the Chicago divorce. This I cannot find. Her evidence as to her ever having seen the Chicago lawyer is rather indefinite; but, on the whole, I find that she did not instruct or procure the divorce proceedings. I believe the fact to be that it was the deceased Reeves who had the proceedings taken, and that he did so that he might procure the woman for his wife. No doubt direct evidence of that is wanting, but I am satisfied upon the evidence that it was neither Switzer nor his wife who had the proceedings taken.

However that may be, it is clear upon the evidence that Reeves knew as much about the matter as the defendant, and that no imposition was practiced upon him.

Such being the case, there is no necessity of my going into the vexed question of the validity of such divorce. I shall assume (without deciding) that the Chicago divorce, notwithstanding the Chicago domicile of Switzer, was and is invalid.

It is argued that the devise being to "my wife, Jennie Reeves," the fact that the defendant was not the wife of the deceased voids the gift; and *Russell v. Lefrancois*, 8 S.C.R. 335, is relied upon. In that case it was held by three Judges in the Supreme Court, in a case under the law of the Province of Quebec, that where the testator, after certain provisions as to debts and a specific legacy for charity, made the provision: "And as to the rest and residue of my said estate of which I may die possessed, I give and bequeath the same unto my beloved wife Julie Morin, as her own absolute property," it appearing that the only consideration for the testator's liberality to Julie Morin was that he supposed her to be "my beloved wife, Julie Morin," whereas, in fact, she had a husband living at the time of the second marriage, this universal bequest to Julie Morin was void through error and false cause. But that was a case decided upon the Quebec law, founded, as it is, upon the Roman civil law. Of the English speaking Judges upon the bench who were skilled in our law, Ritchie, C.J., and Strong, J. (afterwards C.J.), dissented, while Henry, J., expressly says (at p. 353): "We are not called upon to decide this case upon any principles of English law, but according to the law in force in Quebec;" and Gwynne, J., puts his judgment upon "the proper inference to be drawn from all the evidence as to the mental capacity of the testator to make the will . . . which is impeached:"

pp. 376, 377; and does not mention the point now under discussion. Mr. Justice Taschereau (afterwards C.J.), with whom Mr. Justice Fournier agreed, based his conclusions wholly upon the authorities in the civil law. Mr. Justice Strong, after an elaborate consideration of the civil law authorities (from which he draws a conclusion differing from that of the French-speaking Justices) indeed points out in that very case: "The English Court of Chancery has adjudged the question which arises here, the legacy to a person described by the testator as his wife, and afterwards proved not to be his wife, in the same way as Troplong decides it, namely, that error is not to be presumed, and that the legacy is not vitiated by the false description of the legatee" (p. 350). The learned Judge cites *Re Pett's Will* (1859), 27 Beav. 576; *Schloss v. Stiebel* (1833), 6 Sim. 1; *Giles v. Giles* (1836), 1 Keen 685.

In the first case a woman, who had been separate from her husband for 19 years, married the testator, describing herself as a widow. The will contained bequests "to my wife." It was held that the putative widow was entitled, the evidence not shewing that there was anything which amounted to fraud on the part of the legatee.

In the second case the testator became engaged to a lady. In a codicil to his will, after speaking of "Miss A. S. . . . whom I may marry in a few days," and, after certain legacies, the testator said: "In case of my death, I leave to my wife £3,000 sterling," etc., and afterwards uses the language, "the aforesaid A. S., my wife." In another codicil he again speaks of "my wife." The marriage did not take place. The Vice-Chancellor of England (Sir Lancelot Shadwell) affirmed the validity of the gifts to Miss A. S.

The last of the cases cited is also found sub nom. *Penfold v. Giles* (1836), 6 L.J.N.S. Ch. 4. John Penfold and Ann, his wife, had in 1815 executed a deed of separation, with Thomas Giles as a trustee. In 1817 Thomas Giles and Ann Penfold went through a form of marriage. In 1830 Thomas Giles made his will, devising certain properties in trust for his wife, Ann Giles. The validity of this being questioned, she filed her bill, the defence being that she did not answer the description given her in the will, it being proved that John Penfold still was living.

The Master of the Rolls (Lord Langdale) said (S.C. 1 Keen, at pp. 692-3): "It is clear that in point of law a mere misdescrip-

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tion of a legatee will not defeat the legacy. . . . But in the present case the testator, as well as Mrs. Penfold, had an actual knowledge of the existence of John Penfold in the year 1815; and it was not more the duty of Mrs. Penfold than it was the duty of Thomas Giles, the testator, to ascertain that John Penfold was dead before they ventured to proceed to the ceremony of marriage between themselves. There is no more reason why I should impute to the plaintiff (Ann Penfold or Ann Giles) a fraud upon the testator than to the testator a fraud upon the plaintiff. . . . If both had a guilty knowledge, no fraud is committed upon the testator; and, however immoral the conduct of the parties, it is no part of the duty of courts of equity to punish parties for immoral conduct by depriving them of their civil rights." *Mutatis mutandis*, practically all of these remarks apply to the present case.

The judgment of Hall. V.-C., in *Meluish v. Milton* (1876), 3 Ch.D. 27, at pp. 29-30, may also be looked at, and the very recent case of *In re Wagstaff*, *Wagstaff v. Jalland*, [1908] 1 Ch. 162.

In that state of the law this action should be dismissed, and (fraud having been alleged) with costs.

The defendant is entitled to be put in the same position, if possible, as though the undertaking given had been carried out. It makes no difference that the undertaking may have been given under a mistake—an innocent mistake—of his authority by the solicitor. In *Lorymer v. Hollister* (1723), 2 Str. 693, the bailiff, who had a writ for the defendant, came to an attorney, and told him that the defendant desired him to appear in the action for him. The attorney thereupon gave his undertaking to appear. It was found that the bailiff had gone to the attorney of his own accord, and without the direction of the defendant. The Court refused to release the attorney from his undertaking, and obliged him to file common bail, according to the undertaking given.

Again, in an anonymous case (1819), 1 Chit. 129, an attorney, under a mistake of fact, wrote a letter to the plaintiff, saying that he would appear and receive a declaration. Upon discovering his error, he desired to withdraw from his undertaking, but was not permitted to do so.

In *Hellings v. Jones* (1825), 10 Moore 360, shortly after the writ had been sued out, the defendant's attorney applied to the plaintiff to stay proceedings in the action; this was done on the

attorney undertaking to pay the debt and costs. Before the time for putting in bail had expired, the defendant died insolvent, but the Court held that the attorney was bound by his undertaking. The case might be different if the solicitor never intended to give the undertaking in the form in which it was given, as in *Mullins v. Howell* (1879), 11 Ch.D. 763. The present, however, is a case in which it appears that the solicitor is unable to carry out an undertaking which he was unwise enough to give—this inability from no fault of his own. And, while I have no doubt that the Court has power to order the solicitor to pay the costs of the action, so far as they cannot be obtained from the plaintiffs, I do not think that it is obligatory upon the Court so to order.

Peart v. Bushell (1827), 2 Sim. 38, while not quite in point, is analogous.

After much hesitation and wavering of opinion, I have come to the conclusion that in this case I shall not order the solicitor to pay any costs, except the costs of speaking to the case after the failure to add the parties. Of course, the solicitor will have redress for this in proceedings against him who instructed the undertaking to be given: *Kite v. Millman* (1833), 2 M. & Sc. 616; but I cannot dispose of this in the present action.

The consideration which has finally decided my mind is that, had the solicitor at the trial not given the undertaking, but had asked for the order (subsequently made) for representation, I should have made the order, and the trial would have proceeded. It is to be hoped that this lenient view will not tend to encourage the giving of undertakings without the most careful consideration; nor should this disposition of the costs lead members of the profession to look upon an undertaking as a mere matter of form.

The defendant will have leave to appeal from this disposition of the costs, and all other rights are reserved to her against the solicitor.

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IN RE AARON ERB (No. 1).

May 11.

Assignments and Preferences—Appeal from County Court Judge—Jurisdiction—Leave to Appeal—General Words in Notice of Motion—Costs—Power to Award—R.S.O. 1897, ch. 147, sec. 20—63 Vict. ch. 17, sec. 14 (O.)—Con. Rule 1130 (1).

A Judge of the High Court of Justice has no jurisdiction to entertain an appeal or to give leave to appeal from an order of a county court Judge as to the valuing of securities under sec. 20 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147; but, under Con. Rule 784, he may refer the motion to a Judge of the Court of Appeal, who, under 63 Vict. ch. 17, sec. 14 (O.), has jurisdiction to grant leave to appeal in such a case; and *Held*, that to do so was proper in this case, in view of the general words in the notice of motion, "or for such other order as may seem just." Under Con. Rule 1130 (1) costs may be awarded against a party to any proceeding in the Supreme Court of Judicature for Ontario, even though there be no jurisdiction to entertain the matter.

THIS was a motion for leave to appeal from His Honour Judge Chisholm, county court Judge of the county of Waterloo, under the circumstances mentioned in the judgment. The motion was argued before RIDDELL, J., in Chambers, on May 8th, 1908.

W. E. Middleton, K.C., for the applicant.

J. E. Jones, for the Merchants' Bank of Canada.

The facts and cases cited are mentioned in the judgment.

May 11. RIDDELL, J.:—Aaron Erb made an assignment for the benefit of his creditors. The Merchants' Bank of Canada filed a claim for over \$25,000. They held, as collateral security for advances made to Erb, a number of notes made by the Boehmer Erb Co., Ltd., payable to Erb and indorsed by him, to an amount over \$17,500. The bank declined to value these securities, and upon an application to His Honour Judge Chisholm, that learned Judge supported them in that position. Thereupon the assignee served notice of motion before the presiding Judge in Chambers, "by way of appeal from the order" of Judge Chisholm "and to reverse the same, and for an order that the Merchants' Bank of Canada do value the securities they hold as against the Boehmer Erb Company, Limited, pursuant to the . . . Act, or for such other order as may be just." The matter came before my brother Britton, and he, against the protest of the counsel for the bank,

permitted an amendment to be made in the notice of motion changing it into a notice for special leave to appeal under sec. 14 of 63 Vict. ch. 17, (O).^{*} My learned brother then enlarged the motion, and it came on for argument before me Friday, May 8th.

I have had the opportunity and advantage of a conference with my brother Britton, and I agree with him in the conclusion that there is no jurisdiction to entertain the motion. The leave is to be granted "by a Judge of the Court of Appeal." The Supreme Court of Judicature continues "to consist of two permanent divisions . . . called the High Court of Justice for Ontario and the Court of Appeal for Ontario:" Judicature Act, sec. 3 (2). In most other parts of the legislation, "The High Court of Justice for Ontario" and "The Court of Appeal for Ontario" are denominated simply "The High Court" and "The Court of Appeal." I do not think there can be any doubt as to the meaning of the words here, and am of opinion that I have no jurisdiction to entertain this application.

I am asked to transfer the application to a Judge of the Court of Appeal under Con. Rule. 784: "Where any motion or appeal is set down to be heard before a Court which is not the proper Court for hearing the motion or appeal, the same may, upon such terms as may seem just, be transferred to, and shall be heard by, the proper Court for hearing the same." It is admitted that a Judge in Chambers has no jurisdiction to entertain an appeal from the county Judge or to order the Merchants' Bank of Canada to value their securities. So much, then, of the application should be dismissed, and I think with costs. The right to award costs against the applicant in cases in which the tribunal applied to has no jurisdiction was long questionable. Such cases as *Re Isaac* (1838), 1 My. & Cr. 11; *Tench v. Cheese* (1838), 9 Sim. 150; *Rashleigh v. Mount* (1848), 16 Sim. 390, and cf. note; *Yearsley v. Yearsley* (1854), 19 Beav. 1; *Brown v. Shaw* (1876), 1 Ex.D. 425; *Great Northern and London and North Western Joint Committee v. Inett* (1877), 2 Q.B.D. 284; *Crowther*

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^{*} R.S.O. 1897, ch. 76, respecting the enforcement of orders of Judges made under special statutory authority, enacts, in sec. 6, that "there shall be no appeal from the order of a Judge made as aforesaid unless an appeal is expressly authorized by the statute giving the jurisdiction."

63 Vict., ch. 17, sec. 14 (O.), amends this section by adding the words: "Or unless special leave is granted by the said Judge or by a Judge of the Court of Appeal."

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v. *Boult* (1884), 33 W.R. 150, and cases mentioned in the reports; also in our own Courts: *Powley v. Whitehead* (1859), 16 U.C.R. 589; *Re Cosmopolitan Life Association* (1893), 15 P.R. 185; *Cote v. Halliday* (1897), 33 C.L.J. 159; *Sherk v. Evans* (1895), 22 A.R. 242, contain decisions more or less applicable to the discussion. But our Con. Rule 1130 (1)* has, I think, affirmed the power to award costs in such cases. Though there is no jurisdiction in any part of the Supreme Court to deal with what is asked for is clear; but the application is nevertheless a proceeding in the Supreme Court, and costs may be given against the applicant.

As I am of opinion that the general prayer "for such other order as may seem just" may cover an "order allowing appeal," even if, as contended, my brother Britton had no power to allow the amendment (as to which I say nothing) a Judge of the Court of Appeal has apparently jurisdiction to deal with this part of the application, and therefore I may refer it to "a Judge of the Court of Appeal." This will, however, only be upon terms of the applicant paying the costs of the application before my brother Britton and myself.

The order then will be that the application is dismissed so far as the specific relief sought is concerned, with costs. If the costs be paid, the application for leave to appeal will be, under Con. Rule 784, transferred to a Judge of the Court of Appeal; if not, the remainder of this application will also be dismissed. All this, of course, will not and cannot prejudice the applicant if he should be advised to apply directly to a Judge of the Court of Appeal, abandoning any right which he may have under this order.

A. H. F. L.

* Con. Rule 1130 (1):—"Subject to the provisions of the Judicature Act, 1895, and to the express provisions of any statute heretofore or hereafter passed, the costs of and incidental to all proceedings in the Supreme Court shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and to what extent the costs shall be paid."

[IN CHAMBERS.]

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May 12

Certiorari—Proceedings before County Court Judge—Assignments and Preferences Act—R.S.O. 1897, ch. 147—Certiorari after Judgment—Discretion—Motion for Leave to Appeal.

A *certiorari* order may be made by a Judge of the High Court in Chambers to bring up proceedings taken before a county court Judge, under the Assignments and Preferences Act, R.S.O. 1897, ch. 147, and this notwithstanding that a right of appeal by leave of a Judge of the Court of Appeal exists under 63 Vict. ch. 17, sec. 14 (O.).

Before judgment the right to *certiorari* is absolute, but after judgment there is a judicial discretion to grant or refuse; and in such a case as the above *certiorari* should not be granted after judgment until application is first made for leave to appeal.

THIS was a motion for an order of *certiorari* made under the circumstances mentioned in the judgment. The motion was argued before RIDDELL, J., in Chambers, on May 8th, 1908.

W. E. Middleton, K.C., for the applicant.

J. E. Jones, for the Merchants' Bank of Canada.

MAY 12. RIDDELL, J.:—The facts of this case are sufficiently set out in my judgment in *In re Aaron Erb* (No. 1), just handed out. Notice of the application disposed of in that judgment having been served on April 28th, the assignee on May 2nd served another notice of motion. This was of an application "for an order in the nature of *certiorari* to bring up proceedings before the said county court Judge, and to review the same, and for an order directing the valuation of the securities held by the Merchants' Bank, and referring the matter back to the said Judge to make a proper order in accordance with the law in that behalf requiring the said bank to value these securities within a time to be limited or to be barred."

In respect of all else than the application for a *certiorari* order, I cannot deal with the motion except to dismiss it: *Re Paquette* (1886), 11 P.R. 463; *Re Young* (1891), 14 P.R. 303; *Re Simpson and Clafferty* (1899), 18 P.R. 402; R.S.O. 1897, ch. 147, sec. 6; and indeed this is not disputed.

Different considerations, however, apply to the application for a *certiorari* order. As at present advised, I am of opinion that the county court Judge, acting as he was, is an inferior Court, to

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which such an order might be addressed; and that the fact that there is a right of appeal apparently given upon leave obtained from a Judge of the Court of Appeal does not oust the power of this Court to grant such an order.

That *certiorari* will lie is indicated in *Re Paquette*, 11 P.R., at p. 471, and cases therein referred to. So, too, such cases as *King v. Justices of Sunderland*, [1901] 2 K.B. 357, furnish a valuable analogy.

And that the mere existence of a right of appeal does not oust the power of the Court to grant an order of this kind is clear from the authorities cited in *Scholfield & Hill, Appeals from Justices*, p. 239. The right at the common law to a writ of *certiorari* was absolute and *ex debito justitiæ*: *Edwards v. Corporation of Liverpool* (1902), 86 L.T. 627. In that case, after delivery of the statement of claim in an action in the Liverpool Court of Passage, the defendants applied to the Master for a writ of *certiorari*. The Master refused, but on appeal Mr. Justice Bucknill, on the ground that he had no discretion in the matter, reversed this decision, and this judgment was upheld by the Divisional Court, who refused leave to appeal further. The statement of counsel was as follows: "At common law *certiorari* lies as of right to remove the action from any inferior Court in England, and that right can only be taken away by express words in a statute." And this statement seems to be an accurate presentation of the law. For reasons which will shortly appear I need not decide as to the application of this principle to the present case.

The power of this Court to grant such relief is undoubted.

The U. C. Stat. 34 Geo. III. ch. 2, sec. 1, gave the Court of King's Bench thereby constituted and established "all such powers and authorities as by the law of England are incident to a superior Court of civil and criminal jurisdiction;" and the powers and authorities have been continued in the successors of the "Court of King's Bench for the Province of Upper Canada." See also *Colonial Bank of Australia v. Willan* (1874), L.R. 5 P.C. 417. But this absolute right (granting that it exists here at all) does not continue to exist after judgment. "A *certiorari* lies in general for the removal of all causes from inferior Courts, whether the defendant has been proceeded against therein by *capias* or other process." Tidd's Practice, p. 398 of the 9th ed., 1828. "This writ may be sued out before or in some cases after judgment": *ibid.* But

"after judgment a *certiorari* does not in general lie to remove a cause from an inferior Court; and therefore if it be returned thereon that the defendant is condemned by judgment, he shall be remanded . . . and in cases of absolute necessity, as where the inferior Court refuses to award execution, the Court above will grant a *certiorari* after judgment, for the sake of doing justice between the parties . . ." This work, which has received the highest commendation from Lord Brougham in *Earl of Glasgow v. Hurlet & Campsie Alum Co.* (1850), 3 H.L.C. 25, at p. 40 (another and better known testimonial will occur to everyone), is a thoroughly reliable compendium of the law as it then stood. The result is that after judgment the order is no longer *ex debito justitiæ*, but a matter of judicial discretion. The order should in general not be made unless and until all other remedies have failed—at least all remedies which would afford adequate relief. I think no order should issue until after an application has been made to a Judge of the Court of Appeal for leave to appeal. If a proper case is made no doubt leave to appeal will be given—in a matter of such great importance to the business world it would be well to have the question settled unless it be too clear to require settling, as to which of course I express here no opinion.

The application should be dismissed.

As to costs, I do not think that such a motion should have been made before applying to the proper forum for leave to appeal. The applicant will pay the costs.

This order will be without prejudice to the right of the present applicant, after the disposal of a motion to be made to a Judge of the Court of Appeal, to make a new motion before any Judge (including myself) for the relief now refused.

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[DIVISIONAL COURT.]

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SAVEREUX v. TOURANGEAU.

April 21.

Deed—Fraud—Conveyance of Same Land to Two Purchasers—Priorities—Option—Agreement—Registration—Action to Remove Cloud on Title—Leave to Amend—Parties—Grantor—Specific Performance—Terms.

By a writing under seal, but without consideration, dated the 2nd January, 1907, M. covenanted and agreed with the plaintiff that if at any time he (M.) should be desirous of selling the land described in the document, he would give the plaintiff the option of first chance to purchase the same at \$40 per acre, and to give the plaintiff 30 days' notice in writing of intention to sell the property, etc. On the 14th January, 1907, M. signed a written offer, binding for three months from the date, to sell the same land to the defendant at a larger price. On the following day, but after the defendant had express notice of the agreement with the plaintiff, M. executed a formal written agreement to sell the land to the defendant, and the defendant, two days later, paid part of the consideration named, and received from M. a conveyance of the land. The plaintiff's agreement or option and the defendant's agreement of the 15th January were both registered on the 15th January, and the defendant's deed on the 17th January. On the 22nd April, 1907, M. conveyed the same land to the plaintiff, and received a payment on account from the plaintiff; this conveyance was registered on the 24th April, 1907.

In an action to set aside the defendant's agreement of the 15th January and the deed registered the 17th January as being void, and to remove the same as a cloud upon the plaintiff's title, M. being brought in as a third party:—

Held, that the writing of the 2nd January was not a mere option, but a contract with the plaintiff to give him a binding option for 30 days after notice of desire to sell, and, being under seal, there was no need for a consideration; that the defendant took his agreement and conveyance subject to the rights of the plaintiff; but that these instruments were not tainted with fraud, and could not be declared void; as the defendant had full notice of the agreement of the 2nd January, he was thereafter in the same position *quoad* the plaintiff as M. had previously been, and was bound to do the same acts as M. in respect of the land; and, while the plaintiff's action as framed failed, his remedy lay in a claim for specific performance against the defendant and M.; and he was allowed to amend, upon terms, by adding M. as a party defendant and seeking the remedy suggested.

Judgment of Teetzel, J., reversed.

APPEAL by the defendant from the judgment of Teetzel, J., in favour of the plaintiff in an action to set aside, as fraudulent and void and as a cloud on the plaintiff's title, an agreement dated the 15th January, 1907, and registered the same day, and a deed dated the 16th January, 1907, and registered the 17th January, 1907, to the defendant, both purporting to affect part of lot 105 in the 1st concession of the township of Sandwich East, which land was conveyed to the plaintiff by one Meloche, who was also the grantor of the defendant. The plaintiff had a written option of purchase, under seal, from Meloche, dated the 2nd

January, 1907, which was registered on the 15th January, 1907, and on the 22nd April, 1907, Meloche executed a conveyance of the land to the plaintiff. Meloche was brought in by the defendant as a third party, and judgment was given by the trial Judge for the defendant for relief over against Meloche.

The facts are fully stated in the judgments.

The appeal was heard by FALCONBRIDGE, C.J.K.B., BRITTON and RIDDELL, JJ., on the 2nd March, 1908.

F. E. Hodgins, K.C., for the defendant. The action should have been dismissed, but, at all events, the judgment as entered is not in accordance with the direction of the trial Judge. The question is one of priority. Each party has a conveyance from Meloche; the defendant's was registered first; Meloche received the purchase money from both. On the 2nd January he gave the plaintiff an option, and on the 14th he gave one to the defendant. On the 15th the defendant had notice of the first option, and on the 17th he paid \$270. The plaintiff's option was registered, but it was not a contract enforceable as against the Statute of Frauds, nor a completed contract at all, and, granting that the defendant had notice of it, he is not affected by it. To satisfy the statute, the note or memorandum must shew the agreement of the parties to its terms: *Leake on Contracts*, 4th ed., pp. 180, 181 (5th ed., p. 182); *Fry on Specific Performance*, secs. 370, 506; *House v. Brown* (1907), 14 O.L.R. 500; *Dickinson v. Dodds* (1876), 2 Ch.D. 463, 472; *London and South Western R.W. Co. v. Gomm* (1882), 20 Ch.D. 562, 581. There is no agreement where the option is to buy or not to buy: *Helby v. Matthews*, [1895] A.C. 471, at p. 476. The option, if it was good, was revoked, before acceptance and before notice, by the option of the 14th January. As to the effect of the seal, see *Kekewich v. Manning* (1851), 1 De G.M. & G. 176, 184. The *Helby* case shews in what circumstances an option may be revocable. In *Potter v. Sanders* (1846), 6 Hare 1, there was revocation by a later option. The plaintiff's remedy, if any, after the defendant had acquired his rights and paid his money, would be specific performance, and that would be granted only on his paying his purchase money to the defendant: *Weir v. Niagara Grape Co.* (1886), 11 O.R. 700. The following cases shew that this position is correct: *Doe*

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D. C. *Spafford v. Breakenridge* (1852), 1 C.P. 492; *McLennan v. McDonald*
 1908 (1871), 18 Gr. 502, 508; *Daniels v. Davison* (1809-11), 16 Ves.
 SAVEREUX 249, 17 Ves. 433; *Shaw v. Thackray* (1853), 1 Sm. & Giff. 537;
 v. *Fewster v. Turner* (1842), 6 Jur. 144; *Holmes v. Powell* (1856),
 TOURANGEAU 8 De G.M. & G. 572; *Joy v. Birch* (1836), 4 Cl. & F. 57, 84, 85.

R. F. Sutherland, K.C., for the plaintiff. The plaintiff can claim prior to registration. The defendant had notice, and the evidence shews that he was a party to the fraud practised on the plaintiff. An option under seal is not revocable: *Xenos v. Wickham* (1867), L.R. 2 H.L. 296; Anson on Contracts, 10th ed., p. 39; Armour on Titles, 3rd ed., p. 183, citing *Ross v. Harvey* (1853), 3 Gr. 649. The transaction with the defendant was in fraud of the plaintiff: *Gray v. Couchner* (1868), 15 Gr. 419. The deed to Tourangeau passed no title at all, because it was fraudulent *ab initio*: see *McLennan v. McDonald*, 18 Gr. 502; *Latouche v. Dunsany* (1803), 1 Sch. & Lef. 137, 159; *Wigle v. Setterington* (1872), 19 Gr. 512.

Hodgins, in reply. As to the *Xenos* case and the effect of a seal in equity, see Pollock on Contracts, 7th ed., p. 194. Even where there is a seal, there must be a valuable consideration: *Helby v. Matthews*, [1895] A.C. 471.

April 21. BRITTON, J.:—Appeal by defendant from judgment of Teetzel, J. Action tried at Sandwich.

On the 2nd January, 1907, one Alphonse Meloche and his wife were the owners of a parcel of land, part of lot 105, south of the Grand Trunk Railway, in the 1st concession of the township of Sandwich East, containing 22 15-100 acres.

On that day they entered into an agreement, in writing and under seal, with the plaintiff, by which they agreed: (1) if they were desirous of selling and intended to sell this land, they would give the plaintiff notice in writing of such intention; and (2) give the plaintiff 30 days' time within which the plaintiff could purchase; (3) and if the plaintiff wished to purchase, they would sell this land to him at \$40 an acre, equal to \$886 for the parcel.

It may not matter at all in this action that the plaintiff purchased another parcel from Meloche, but he made such purchase, and there were special reasons why the plaintiff wanted to buy the parcel now in question.

The defendant wanted this same parcel of land, and entered into negotiations with Meloche for its purchase.

On the 14th January the defendant obtained an offer to sell from Meloche. It is called an agreement of sale, and the expressed consideration is one dollar, but it does not appear that any money was paid. It is not under seal; there is not a full description of the land—it is called 22 1-5 acres—and it states that “this offer is binding for three months.”

The defendant lost no time in coming to a conclusion to accept, so he procured a proper description of the land, and on the following day—viz., the 15th January—entered into a formal agreement with Meloche for the purchase of this land. While this agreement in writing was in course of preparation on the 15th, the defendant had express notice of the option or agreement given by Meloche to the plaintiff. Notwithstanding this, the defendant continued the negotiations with Meloche, and completed the agreement.

Both agreements were registered on the 15th January, 1907; both at 4 o'clock—the plaintiff's as No. 8812, and the defendant's as No. 8813.

As a matter of fact, the plaintiff's agreement has priority of registration, but nothing turns on that, for, as I have said, the defendant had express notice of the agreement with the plaintiff. The defendant made great haste in doing all that was possible to clinch this purchase, for, on the following day, the 16th January, he obtained the impeached conveyance of this land from Meloche, and that instrument was made “in pursuance of the Act respecting short forms of conveyances,” and this conveyance was duly registered in the proper registry office on the 17th day of January, 1907.

Notwithstanding the fact of the defendant having obtained the completed conveyance, the plaintiff, on the 22nd April, 1907, obtained from Meloche what purports to be a similar conveyance of the same land.

There is no evidence of the possession of the land, or anything other than what pertains to the agreements, conveyances, payment of money, etc.

Both plaintiff and defendant wanted the property from

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D. C. Meloche, a weak man, of no business ability, but knowing enough
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It is not a question of improvidence of the man Meloche or of fraud upon him.

The plaintiff says he did not, when he accepted the conveyance of 22nd April, know of the actual conveyance by Meloche to the defendant—viz., the conveyance of 16th January, 1907—but he did know that the defendant was asserting a claim under the writing of the 15th January or some other document.

I agree with the findings of fact as to notice and knowledge on the part of the defendant, and as to the facts and circumstances attending the execution of the documents, but all this does not warrant the conclusion that the defendant acquired nothing by the deed to him, and that this deed is fraudulent and void against the plaintiff.

The result is that, instead of the defendant acquiring nothing, he acquires all the interest of Meloche in the property in reference to which Meloche had given to the plaintiff the option to purchase.

The defendant then stood in the place of Meloche. The plaintiff had, as against the defendant, the same right as he would have had against Meloche had Meloche not conveyed, but had simply, after determining to sell, and after the plaintiff had exercised his option in favour of buying, refused to sell.

The counsel for defendant, at the trial, took the view and presented his argument, that this case was, practically, an action for specific performance; and, at most, the defendant could only be held liable to the same extent as Meloche; and it was argued that the agreement could not be enforced against Meloche, because, although under seal, it was not in fact, as sufficiently appears, for valuable consideration.

The agreement, after acceptance of it by the plaintiff, can no longer be treated as voluntary. When accepted, within the time and terms of Meloche's offer, then it is no longer to be treated as a voluntary agreement.

As to specific performance against a second purchaser who has had notice of first agreement, see *Potter v. Sanders*, 6 Hare 1: "If a vendor contract with two different persons for the sale to each of them of the same estate, the Court will, *primâ facie*, en-

force the contract which was first made; and if the party with whom the second contract was made should, after notice of the first contract, procure a conveyance of the legal estate in pursuance of the second contract, the Court will, in a suit for specific performance by the first purchaser against the vendor and the second purchaser decree the latter to convey the estate to the plaintiff."

The case for specific performance is, if anything, rather stronger against this defendant than it would be against Meloche alone.

The defendant interfered in a way, if not fraudulent, at least unusual, as against a person desiring to purchase.

It was a deliberate attempt on the defendant's part to get property that he knew was wanted by the plaintiff. Such cases as *Shaw v. Thackray*, 1 Sm. & G. 537, apply. The head-note of that case is: "Although the Court will not compel performance of a contract obtained from a person in a state of intoxication; yet, where, after a contract fairly entered into with a man addicted to drinking, to sell to the plaintiff leasehold premises for £735, another person, with notice of this contract, within a few days prevailed on the vendor to sell and execute an assignment thereof to him for £760, the Court decreed specific performance of the first contract." See also *McLennan v. McDonald*, 18 Gr. 502.

If this were the ordinary case of the vendor disregarding his first agreement and selling to a third party, it is perfectly clear that the vendor would be a necessary party to an action for specific performance.

In this case the vendor, Meloche, on the 22nd April, executed what purports to be a conveyance to the plaintiff. This could not give the plaintiff title to the land: that had passed to the defendant, subject to the plaintiff's rights, under the conveyance of the 16th January. But, if it did not pass the title to the land, it would be an assignment of any claim of Meloche, leaving the way clear to have the rights of the plaintiff as against the defendant determined in this action.

Then the matter is complicated by the fact that both the plaintiff and defendant have paid part of the purchase money, and neither has paid in full, so, in my opinion, the ordinary rule must be followed in this case of making Meloche a party to the action.

It is not enough that Meloche was brought in by the defen-

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dant on third party notice; he should be made a party to the action.

At the trial the plaintiff's counsel declared with emphasis that this was not an action for specific performance; that the plaintiff already had the title; and that the action was to remove the conveyance to the defendant—as a cloud on the plaintiff's title.

In my opinion, the plaintiff's rights were misconceived.

I would allow the appeal, and order a new trial.

The judgment against Meloche should be set aside without costs.

Meloche should be made a party defendant to the action; the plaintiff and defendant each to have leave to amend as they may desire.

Costs of the parties, except Meloche, as to the trial shall be costs in the cause, unless otherwise disposed of by the trial Judge. Costs of appeal to be paid by the plaintiff.

It appeared during the argument, and by the evidence of one of the witnesses, Mr. Cleary, that a settlement was discussed and nearly arrived at. This is a case where a settlement would have been eminently proper, and even now would appear to be in the interests of the parties.

Since the above was written I have had an opportunity of reading the judgment of my brother Riddell, and if the plaintiff wishes for a new trial on terms mentioned, we agree as to the disposition made of the costs. If he does not wish for a new trial, the plaintiff should pay costs.

FALCONBRIDGE, C.J.:—I agree.

RIDDELL, J.:—In 1892 the plaintiff bought from one Meloche a block of land, and about the 2nd January, 1907, another block, leaving Meloche the owner still of a small parcel, containing about 22 acres, south of the Grand Trunk Railway. An agreement under seal was entered into by the plaintiff and Meloche as to this parcel, in the following terms:—

“Memorandum of agreement entered into this second day of January, 1907, between Alphonse Meloche and Josephine Meloche, his wife, of the township of Sandwich East, of the first part, and Frank Saveroux, of the same place, of the second part.

“Whereas the parties of the first part are the owners of part

of lot number one hundred and four (this 'four' was, before the execution of the document, changed to 'five') south of the Grand Trunk Railway, in the first concession of the said township, containing twenty-two acres and fifteen-hundredths of an acre, and have agreed and do hereby covenant and agree with the party of the second part that if at any time they are desirous of selling the said property, they will give him, the party of the second part, the option of first chance to purchase the same for the price of forty dollars per acre. And the parties of the first part further covenant and agree that they will give the party of the second part thirty days' notice in writing of their intention to sell the said property, whenever they are desirous of disposing of the same.

"Signed in the presence of FRANCIS JANNISSE DAVID LAMOND	}	ALPHONSE MELOCHE. (Seal.) JOSEPHINE MELOCHE." (Seal.)
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This document was given to the plaintiff, but not registered at the time.

Some time in the latter part of December, 1906, or in January, 1907, the defendant began negotiating with Meloche, and late in the evening of the 14th January Meloche gave him a writing in the following terms:—

"J. R. Tourangeau & Co.,

"Windsor, Ont., Jan. 14th, 1907.

"In consideration of one dollar to me in hand paid, I hereby agree to sell to J. R. Tourangeau & Co., of the city of Windsor, in the county of Essex, real estate brokers, there (*sic*) heirs or assigns (*sic*), all and singular that certain parcel or tract of land situated, lying, and being in the township of Sandwich East, concession 1st, starting from the Grand Trunk Railway track south, containing 22 1-5 acre more or less, known as the Meloche farm, at or for the price or sum of \$1,000.

"This offer is binding for three months from this date.

"Dated at (illegible) this 14th day of Jan., 1907.

"Witness.

"ALPHONSE MELOCHE."

The defendant received this option on the 14th; on the 15th he looked over the property and looked up the registry, searching the title, etc., and made up his mind that he would take the property. At the time he had obtained the option, he had been

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informed by Meloche that the plaintiff had made him (Meloche) an offer, but Meloche had added that he was going to sell to the man who would give him the most money.

One Gignac, a real estate agent, was acting for Meloche, and in the afternoon of the 15th the defendant went to Gignac, and told Gignac that he would take the property and pay cash. Gignac then set about preparing a more formal document for execution. The plaintiff, in the meantime, had heard from some source that the defendant was trying to buy this property, so he got hold of Meloche, and with Meloche and one Piquet, who, it seems, was trying to buy that same property, he went to Gignac's office, and there found the defendant and Gignac in the act of preparing the formal agreement. He notified the defendant of his claim, said he had an option on the land, told the defendant that he had no right to buy, and Meloche that he had no right to sell the land; and produced and shewed a copy of his agreement, which was read by Gignac and perhaps by the defendant aloud. Some conversation took place as to the lot being 104 or 105, but there can be no doubt that the defendant knew perfectly well that the lot covered by the plaintiff's agreement was the lot he was buying, and the most express notice has been abundantly proved.

Gignac continued with the preparation of the formal agreement; and it was signed upon that day. This was an agreement on the part of Meloche to sell for \$1,000: \$275 down and the balance on the delivery of a sufficient conveyance, say, on the 1st February, 1907, the defendant agreeing to pay accordingly; and there were certain provisions as to title, etc. (not material).

The defendant paid \$270 to the solicitor acting for Meloche, not upon the execution of the agreement, but two days after, upon procuring a deed; of this \$20 was to go to Gignac for drawing the conveyance and attendance.

The plaintiff, on the morning of the 15th January, about 11 o'clock, had taken his "option" to be registered—objection had been taken to the jurat of the affidavit of execution—the plaintiff paid the registration fee, and took away the document for rectification. In the afternoon he and Tourangeau went on the same car about 4 o'clock, and arrived at the registry office about the same time, and both the plaintiff's "option" and the defendant's

agreement were registered as of the same day and hour, the former as No. 8812 and the latter as No. 8813.

The conveyance to the defendant was not made forthwith, but on the 17th January a deed was executed (dated the 16th) by Meloche to the defendant of this land, the deed being "in pursuance of the Act respecting short forms of conveyances," and containing the usual clauses. This was registered at 2.20 p.m. of the 17th January, 1907, as No. 8815.

On the 19th January the plaintiff served formal notice of his desire to purchase; and thereafter some negotiations took place with a view to a settlement, but these need not be noticed further than to say that they failed.

The defendant continued from time to time to pay small sums to Meloche upon the purchase price. Cheques are produced which shew that by the end of March the sum of \$310 had been paid by the defendant to Meloche; it was supposed that he would accept this sum, with a small amount for his trouble; no actual tender was made, and probably, had one been made, it would have been refused. However that may be, the plaintiff went on dealing with Meloche as though no agreement had been made with the defendant, or deed made to him; and upon the 22nd April, 1907, Meloche made a deed, in the usual form under the Short Forms Act, to the plaintiff, for the expressed consideration of \$886; a payment was made the same day of \$400. This conveyance was registered the 24th April. Before this deed was executed or any money paid, the solicitor for the plaintiff had searched the registry office, and knew of the deed to the defendant; no doubt he informed his client of the precise nature of the instrument—the client certainly knew of its existence. Meloche authorized the solicitor for the plaintiff to pay \$330 to the defendant out of the purchase money, and, though the plaintiff's solicitor was, doubtless, willing to pay this sum, there was no formal tender.

In addition to paying the sum of \$400 upon the 22nd April, the plaintiff, upon the following day, executed a mortgage to Meloche for \$400—this does not seem to have been registered.

On the 18th October this action was launched, the plaintiff claiming an order setting aside the defendant's agreement of the 15th January and the deed registered the 17th January as being

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void, and to remove the same as a cloud upon the plaintiff's title.

The action was tried by my brother Teetzel at Sandwich in December last. That learned Judge held that, under the circumstances of the case, the document of the 2nd January was binding upon Meloche; that the defendant had notice thereof at the time of his purchase; and that the agreement and deed of the defendant were void as against the plaintiff and should be set aside, the defendant to have a lien upon any unpaid purchase money due by the plaintiff to the extent of the amount alleged to have been paid by him, viz., \$602, and also for \$20, which the learned Judge allowed for costs of the third party procedure, including the trial. He also gave the defendant judgment for \$602 and interest and \$20 for costs against the third party, Meloche.

The defendant appealed, and the matter was argued by counsel for the defendant and plaintiff, the third party not appearing.

We suggested that the case was one which might be adjusted by the parties, and so have reserved judgment till the present time.

It would, perhaps, have been better to make Meloche a party to the action; but neither party having thought well to take that course, we must dispose of the case as we find it.

Had the agreement of the 2nd January been a mere option not under seal, I agree with the defendant that Meloche would have been at liberty to disregard it as not binding upon him, and that he might retract it before acceptance, and probably the act of negotiating a sale to the defendant would be in itself a retraction without notice to the plaintiff: *Dickinson v. Dodd*, 2 Ch.D. 463. But I do not read this document as an option. I think it is a contract with the plaintiff to give him a binding option for thirty days after notice has been given him of the desire to sell. Being under seal, there is no need for consideration to give this contract full effect in law.

The defendant, before he took his conveyance or agreement—before he paid any money—had actual notice of the contents of this document; and must be held to have taken his agreement and conveyance subject to the rights of the plaintiff.

I am unable, however, to follow the learned Judge in his conclusion that the conveyance is void. No doubt, the procuring of this deed and of the agreement upon which it was based savoured

of sharp practice, and such conduct has in several cases been called a species of fraud or *mala fides*, but it cannot be said that the conduct of the defendant was tainted with fraud in the sense in which the word is used when a conveyance is declared void for fraud. There is no rule which prevents any person buying the property of another for value, although that other may have contracted to sell it to a third person, and that with the most express notice of such contract. There is, indeed, some authority for saying that, under circumstances like those in this case, the purchaser holds free from any equity of the former contractee.

In *Crabtree v. Poole* (1871), L.R. 12 Eq. 13, the defendant P. had agreed to sell to the defendant M. M. had assigned the contract to the plaintiff, receiving considerable money for such assignment—the agreement was registered—the plaintiff offered to pay P. the amount M. had agreed to pay, giving notice of his purchase. P. refused to convey unless the plaintiff bought another plot also from him. The plaintiff declined, whereupon P. and M. conveyed to H. Upon a bill filed claiming that H. had notice of the plaintiff's title, it was held by Lord Romilly, M.R., that, even if H. had notice, the deed must stand. "The plaintiff was told, and knew perfectly well, that P. would not sell one plot without the other," says the Master of the Rolls, at p. 15. So, in the case under consideration, the plaintiff knew perfectly well that the owner, Meloche, would not sell the land except for the higher figure, and, *Crabtree v. Poole* being authority, the defendant is entitled to the land. I do not find that *Crabtree v. Poole* has been overruled or questioned in any way.

But, supposing this case not to apply, it does not seem that the plaintiff can succeed in this particular action at all events. The purchaser, under such circumstances, at the worst places himself in the precise position of his vendor *quoad* the rights of such third person, and he has no higher rights than his vendor. That is what is meant in many of the cases by the statement "the purchaser does not put himself in any higher position by taking a deed or paying the purchase money." His position is no higher than that of his vendor. No case that I know of has said that, in such circumstances, the purchaser does not by taking a conveyance put himself in a position different from that in which he himself previously stood.

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The conveyance of the 16th (17th) January to the defendant conveyed the land to the defendant; and, as the defendant had full notice of the agreement of the 2nd January, he was thereafter in the same position *quoad* the plaintiff as the vendor had previously been.

"If he is a purchaser with notice, he is liable to the same equity [as his vendor], stands in his place, and is bound to do that which the person he represents would be bound to do:" Lord Loughborough, L.C., in *Taylor v. Stibbert* (1794), 2 Ves. Jr. 437, at p. 439.

"Every subsequent purchaser . . . , with notice, becomes subject to the same equities as the party would be from whom he purchased:" Story's Eq. Jur., sec. 789, and cases cited.

In "cases of a contract to sell lands . . . if a subsequent purchaser has notice of the contract, he is liable to the same equity, and stands in the same place, and is bound to do the same acts, which the person who contracted, and whom he represents, would be bound to do:" Story's Eq. Jur., sec. 396.

"It may be laid down as a general rule that a purchaser with notice is, in equity, bound to the same extent and in the same manner as the person was of whom he purchased: for instance, he will be bound by a trust, or incumbrance, or by any agreement respecting the estate, of which he has notice, and which would have bound the estate in the hands of the vendor:" Dart on Vendors and Purchasers, 7th ed., pp. 906, 907.

This is the rule in equity independently of any legislation. There is no pretence that legislation has rendered a deed void under such circumstances, unless the Registry Act has such effect. And, granting that we are to look upon the registration upon the 15th January by the plaintiff of his "option" as effective against the defendant, sec. 92 simply declares that such registration shall constitute notice, and takes the case no further than the actual notice already given by the plaintiff and his solicitors—the subsequent deed is not declared void like an unregistered document under sec. 87.

The deed to the defendant, then, was effective; and the highest the plaintiff can put his case is that the defendant, after the execution of the deed, was "bound to do the same acts" as Meloche in respect of the land. This is sufficient to dispose of the present action.

It may be well to state, for the guidance of the parties, how the case appears on further analysis. As at present advised, I am of opinion that what was done by the plaintiff was, in effect, a declaration by him to the defendant and Meloche that he intended to accept the option which Meloche had agreed to give him, and I shall assume that he had a right, that the defendant was "bound to do the same acts" as Meloche. The "option," though under seal, was admittedly without consideration, and "a voluntary bond or covenant, that is, one made without a consideration, is binding in law; but in equity, though allowed full legal effect, it is not assisted with the auxiliary equitable remedies of specific performance or injunction:" Leake on Contracts, 5th ed., pp. 429, 430.

"The Court will never lend its assistance to enforce the specific execution of contracts which are voluntary, or where no consideration emanates from the party seeking performance, even though they may have the legal consideration of a seal; and this principle applies whether the contract insisted on be in the form of an executory agreement, a covenant, or a settlement:" Fry on Specific Performance, sec. 116.

Whether an action for damages would lie at the instance of the plaintiff against Meloche upon the deed being made to the defendant, we need not consider. Such an action would not lie against the defendant. An action for specific performance would not have lain before the execution of the deed; and it can scarcely be argued that the execution of the deed added to or increased the plaintiff's rights. Sometimes difficult questions have arisen as to how far the purchaser is bound by notice of an executory agreement which is either in whole or in part void or voidable, but no case has suggested that where there is an executory agreement to sell land which is not enforceable as such against the original owner, and the original owner himself, in open disregard of such agreement, proceeds to sell and grant to another—himself shewing, as plainly as acts can shew, that he is disputing the validity of such agreement—this agreement may, though not enforceable specifically against the vendor, be enforced against the purchaser with notice.

In any event, the plaintiff has not followed the proper practice—he should have definitely insisted upon his contract, and then,

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having done all that he could do, he should have brought an action against Meloche and the defendant for specific performance, when the rights of all parties might be worked out. I cannot see that we can now, and in this action, make an order that the defendant convey to the plaintiff, or a declaration that the defendant is trustee for the plaintiff. That was not argued before us, and is not sought in the prayer of the statement of claim. It is possible that if all the facts were certainly before the Court, we might mould the present pleadings, and give relief of the kind, if we thought such relief was the right of the plaintiff. For reasons which I have indicated, I do not, as at present advised, think that the plaintiff is entitled to such relief at all, but the dismissal of this action may be without prejudice to any other action the plaintiff may be advised to bring. Before launching an action of the nature indicated, it would be well for the plaintiff and his advisers to consider whether the plaintiff is in a position to call upon the equitable rule in respect of a purchaser with notice, in view of such cases as *Chetwynd v. Morgan* (1886), 31 Ch.D. 596; *Hervey v. Audland* (1845), 14 Sim. 531; *Ward v. Audland* (1837), 8 Sim. 571, C. P. Cooper 146; whether, even supposing the "option" to be valid as against either the defendant or Meloche, he (the plaintiff) did all he was called upon to do to entitle himself to a conveyance, as "a person exercising the option (in an ordinary case of contract for purchase) has to do two things—he has to give notice of his intention to purchase and to pay the purchase money:" *London and South Western R.W. Co. v. Gomm*, 20 Ch.D. (C.A.) 562, at p. 581, per Jessel, M.R.; and *cf. McCreight v. Foster* (1870), L.R. 5 Ch. 604; *S.C., sub nom. Shaw v. Foster* (1872), L.R. 5 H.L. 321; and whether, as against this defendant, the insisting by the plaintiff upon the right of Meloche to convey to him in fee and the total nullity of the plaintiff's deed may not disentitle him to any relief as against the defendant, and relief then could not be obtained against Meloche, if, indeed, any could have been obtained at any time before and especially after the deed of April to the plaintiff.

If a new action be brought, the effect of the deed to the plaintiff by Meloche will, perhaps, be considered—whether, under the whole facts of the case as they may appear in evidence, a vendor's lien remained in Meloche, or, if ever existing, had not

been lost before the deed; whether such lien, not being a mere personal right, but assignable—*Armstrong v. Farr* (1885), 11 A.R. 186—passed to the plaintiff by the deed of the 22nd April, by virtue of R.S.O. 1897, ch. 124, sec. 3, ch. 119, sec. 12; or without the legislation, under the principle of *Rayne v. Baker* (1859), 1 Giff. 241, whether the registration, being notice to those only who deal with the land subsequent to the registration, any notice was given to the defendant of such deed, and, if so, the effect of such notice upon the subsequent payment of money to Meloche, and Meloche's position in receiving money from both plaintiff and defendant, and the position of the mortgage from the plaintiff to Meloche—these may all be considered in view of the facts to be proved. The present case was not launched and has not been carried on in the view now suggested, and, while I had at first thought it would be necessary or proper to consider these matters, further examination has convinced me that all the facts have, or may have, not been brought out, and we should not pass upon them now.

Upon this record, as framed, the plaintiff fails, and his action should have been dismissed, and he should pay the costs of the appeal at least. As to the costs of the trial, the plaintiff has been endeavouring to enforce a voluntary agreement, to insist upon the acquisition by himself of land at what now seems an undervalue; he, after purchase by the defendant and deed registered, insisted upon dealing with the original owner, instead of the man who now stood in his shoes; his action I think unfounded. In strictness, though the conduct of the defendant has not been all that could be desired, but such as the Courts have described as a species of fraud or *mala fides*, he should be paid his costs of the action as well, and, if the plaintiff does not accept the alternative I am about to mention, that result should follow. It may, however, be that the plaintiff would prefer to amend his proceedings, make Meloche a party, and have all the matters in question between the three parties tried out in this action. If so, he may have that privilege upon paying the costs of the appeal, and in that event the other costs will be in the cause. He will have 10 days to express his decision. Though Meloche has not appealed, the necessary result of this judgment is that the judgment against him will also be set aside, but without costs.

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I still hope that the parties may find a way to settle their difficulties without further litigation.

Since the above was written, the case of *MacLennan v. Foucault* (1908), 11 O.W.R. 659, has been decided by the Chancery Division. I do not think that it has any bearing upon the present case. There one Turpin had conveyed the land to the plaintiff, who entered into possession by his tenant. Some years thereafter the defendant, with notice of the ownership of Turpin, procured a conveyance to himself of the land from one Charette, Turpin's vendor. It was held that the defendant's deed was void as against the plaintiff. So here, if Meloche had executed a conveyance whereby the title in the land had passed to Savereux, Tourangeau would not have "bettered his position" by taking a conveyance to himself, having notice of the ownership of Savereux. But, as the facts are, the whole transaction between M. and S. was *in fieri*—no title has passed—all that S. had was, at the highest, an agreement to convey. And the rule that equity considers as done what should be done, cannot be invoked in favour of a volunteer or one claiming under a contract, in fact without consideration.

E. B. B.

[RIDDELL, J.]

IN RE SCHOOL SECTION NO. 3, MERSEA.

1908

May 8.

Public Schools—Union School Section—Formation of—Appeal from Township Councils—Lands Mentioned in Petitions—Exclusion of, and Inclusion of Other Lands—Powers of Arbitrators—1 Edw. VII. ch. 39, secs. 42, 46, 47 (O.).

Petitions were presented to the councils of two townships, asking for the formation of a union school section under the Public Schools Act, 1 Edw. VII. ch. 39, sec. 46 (1). The councils having refused to pass a by-law, an appeal was had to the county council, under sec. 47, as a result of which arbitrators were appointed:—

Held, that the arbitrators appointed by the county council had the right, in forming the union school section, to leave out, or take in, land not mentioned in the petitions, and that their jurisdiction was not limited to a mere granting or rejecting of the prayer of the petitions.

In re Churchill and Township of Hullett (1905), 11 O.L.R. 284, followed.

In re Sydenham School Sections (1904), 7 O.L.R. 49, distinguished.

THIS was an appeal by leave given under 6 Edw. VII. ch. 53, sec. 29 (4) (O.), from the judgment of the junior Judge of the county court of Kent. The appeal was argued in Weekly Court at Toronto, on the 7th May, 1908, before RIDDELL, J.

D. L. McCarthy, K.C., for the appellants.

C. A. Moss, for the respondents.

The question involved is stated in the judgment.

MAY 8. RIDDELL, J.:—The sole question for decision is whether arbitrators appointed by the county council have the right, in forming a union school section, to leave out any land mentioned in the petitions or to take in any land not therein mentioned. In the particular case counsel agree that the arbitrators have taken in lands in Mersea township not mentioned in the petition, and left out some in that township and more in Gosfield township, which is mentioned in the petitions.

Petitions were presented to the councils of the two townships as provided by sec. 46 (1) of the Public Schools Act, 1 Edw. VII. ch. 39; the councils refused to pass a by-law, and an appeal was had to the county council, under sec. 47; the county council appointed arbitrators, whose action is now complained of.

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If this were a case of the proposed formation of a new section entirely within a single township, I should be bound by *Re Sydenham School Sections* (1903), 6 O.L.R. 417; (1904), 7 O.L.R. 49, to hold that the arbitrators had exceeded their powers; but the present is not such a case, but rather like the case of *In re Churchill and Township of Hullett* (1905), 11 O.L.R. 284. As I read the latter case (which was decided after and with full consideration of and distinguished the *Sydenham* case), arbitrators appointed under sec. 46 (and those appointed by the county council are given the same powers under sec. 47) have much more extensive powers than those appointed under sec. 42. In the former case the arbitrators are not, although in the latter case they are, simply to pass upon the propriety of granting the prayer of the petition. In the former case there is "no reason for limiting their jurisdiction to either action in exact conformity with the prayer of the petition, or a rejection of the request of the petitioners:" *per* Meredith, C.J., in 11 O.L.R., at p. 290, giving the judgment of the Court. It is true that this expression of opinion is not absolutely necessary for the decision of the case, as is shewn by the judgment itself. But I do not consider myself at liberty to disregard the deliberate expression of opinion of a Divisional Court. It must be left to a higher court to decide (if it is to be decided) that the opinion is erroneous.

I do not think that the distinction sought to be drawn between the present case and the *Hullett* case is substantial.

The *Arthur* case (1903), 2 O.W.R. 930, is not in point.

The appeal will be dismissed with costs.

G. G.

[DIVISIONAL COURT.]

ATKINSON V. DOMINION OF CANADA GUARANTEE AND ACCIDENT CO.

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Feb. 21

Insurance—Accident Policy—R.S.O. 1897, ch. 203, secs. 148 (2), 159—Construction of Statute—"Happening of the Event Insured Against"—Commencement of Action—Leave Given by Judge after Lapse of Time—Nunc Pro Tunc—Condition Precedent—Pleading—Evidence—Verdict of Jury—Beneficiary.

An action brought by the widow of a deceased person, on an accident insurance policy issued to him by the defendants, was commenced more than one year, but less than one year and six months, after his death, without the leave required by the Ontario Insurance Act, sec. 148 (2). Leave was, however, granted by the trial Judge after the expiry of eighteen months from the death, the order being dated *nunc pro tunc* as if made on the date of the commencement of the action:—

Held, (1) that the words, "happening of the event insured against," in the statute, had reference to the death of the person insured, and not to the accident which caused his death, and, consequently, the time within which the action should be brought began to run at the date of his death.

(2) The trial Judge had no jurisdiction to give leave to the plaintiff to commence her action by his order made at the trial, as it was then more than eighteen months after the death, and the plaintiff's action failed because it was not begun in time.

There was a direct conflict in the evidence as to whether deceased died from disease, as alleged by the defendants, or from the result of the injury he received, and there was also a question as to whether the plaintiff's own evidence did not support the conclusion that the injury was sustained by the deceased while lifting, in which case it would not be covered by the policy. There was other evidence, however, tending to explain this circumstance, and to establish that the injury was caused, not by lifting, but by slipping, and the jury found in favour of the plaintiff on the questions submitted to them on these points:—

Held, that the case was properly left to the jury, and that where there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand.

Commissioner for Railways v. Brown (1887), 13 App. Cas. 133, followed.

Held, also, that the defendants were not bound to plead the failure of the plaintiff to comply with the condition of the policy requiring the action to be brought within three months from the time when the right of action accrued, as it was by the terms of the policy a condition "precedent to the right of the insured to recover" thereunder, and the onus lay upon the plaintiff to shew that her action was brought in time.

Home Life Association of Canada v. Randall (1899), 30 S.C.R. 97, followed.

Judgment of Clute, J., including his order extending the time for bringing the action, reversed.

THIS was an appeal by the defendants from the judgment of Clute, J., in an action tried before him with a jury at Hamilton on 14th January, 1907. The action was brought by the widow of Robert Atkinson on an annuity accident policy issued to him by the defendants, and was commenced on the 31st October, 1906. The accident which was alleged to be the cause of his death occurred on 12th April, 1905, and he died on 5th June following. Leave was

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not obtained to bring the action, as required by R.S.O. ch. 203, sec. 148 (2), until it was given at the trial, when Mr. Justice Clute made an order that the plaintiff should be at liberty to commence the action notwithstanding the lapse of time, and that the order should be dated *nunc pro tunc* as if made on the day of the date of the commencement of said action. At the same time he found in favour of the plaintiff on the answers of the jury to questions of fact submitted to them, and his own finding as to certain reserved issues, and directed judgment to be entered for the plaintiff for \$925 and costs.

From this judgment the defendants appealed to a Divisional Court, and on the 8th day of April, 1907, the appeal was argued before MEREDITH, C.J.C.P., MACMAHON and TEETZEL, JJ.

E. F. B. Johnston, K.C., and *R. McKay*, for defendants.

W. M. McClemtont, for plaintiff.

February 21, 1908. MACMAHON, J.:—This is an appeal from, and to set aside the judgment pronounced at the trial of the action by Mr. Justice Clute, and for an order dismissing the action.

The grounds taken in the notice of motion are:—

That the evidence failed to shew that the death was due to injuries resulting from external, violent and accidental means, but on the contrary shewed that the death of the deceased was due to disease.

That a nonsuit should have been entered, as the evidence on behalf of the plaintiff clearly established that the injuries alleged to have been sustained by the deceased, if sustained, were sustained while lifting, and that the said injury was not, therefore, covered by the policy sued on.

That the action was not commenced within the period limited by the contract, and that the learned Judge erred in assuming to make an order under the provisions of sec. 148 of Revised Statutes of Ontario, ch. 203, the said statute only permitting the making of an order before the institution of an action, and there was no jurisdiction to make an order *nunc pro tunc*.

And that the learned Judge erred in refusing, after he had determined to make such order, to allow the defendants to plead a failure of the plaintiff to furnish proofs of loss under the terms of the policy.

The plaintiff, Margaret Atkinson, is the widow of the late Robert Atkinson, coach-cleaner, to whom the defendants, on the 14th of February, 1903, issued an "annuity accident policy" for the sum of \$1,000, the annual premium on which was \$7.50, insuring against loss of life resulting from external bodily injuries effected through external violent and accidental means; and providing (clause F) that if death resulted from such injuries independently of all other causes within ninety days, the company would pay the principal sum assured to his wife, the plaintiff herein.

The policy was renewed from year to year, and was in force at the time of the death of Robert Atkinson on the 5th June, 1905.

The fifth condition of the policy provides: "That . . . affirmative proof of death . . . shall be furnished to the company . . . to the satisfaction of the directors within four months from the sustaining of the injury, when claim is made under clause F."

The tenth condition reads: "The insurance does not cover . . . death, . . . the cause of which is unknown or incapable of direct and positive proof . . . voluntary over-exertion, lifting," etc.

The ninth condition is: "That no moneys shall be payable under this policy unless and until all the terms, provisions, conditions and directions contained therein shall have been complied with, and a period of three months shall have elapsed from the time when the affirmative proof aforesaid shall have been furnished to the satisfaction of the directors, and no action shall be brought under this policy unless within three months from the time when right of action shall accrue."

The deceased was injured on the 12th of April, 1905, and on the 29th the plaintiff filled up one of the blanks furnished by the company, containing a notice and giving particulars of the accident, to which she signed her husband's name, and sent it to the head office of the company, the material parts of which are as follows:—

"6. My occupation is a coach-cleaner.

"7. At time of injury I was coach-cleaning.

"8. The injury was bad strain.

"9. It was received in the following manner: I was helping lift a box of ice in the baggage car and strained myself in the groin.

"12. My medical attendant is G. S. Rennie."

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After her husband's death, Dr. Rennie—who was one of the physicians in attendance on the deceased during his illness—filled in, in the plaintiff's presence, a blank "affidavit of claim" printed by the defendant company, which was signed by the plaintiff. It gives the age of the deceased as being 45, that he was injured on the 12th April, 1905, and that his injury was caused "by lifting a box of ice and strained himself;" that his medical attendant was Dr. Rennie of Hamilton, and that deceased was confined to his bed from the 15th April to the 5th June, 1905. Although Atkinson was then dead, there was no claim for the principal sum, but solely for the weekly disability payments during the intervening period named. Although signed by the plaintiff, it was not sworn to by her, nor is it dated.

[The learned Judge referred to the evidence of the plaintiff's son, which went to shew that the injury received by the deceased was not caused by "lifting," as stated in the notice and affidavit of claim, but by slipping and a consequent strain. He also referred to the medical evidence, which went to shew that the death of the deceased was not a result of the injury but was due to disease, and continued]:

The following were the questions submitted to the jury, with the answers thereto:—

1. Did Robert Atkinson come to his death by reason of the injuries received on or about the 12th of April, 1905? A. Yes.

2. Did death result from such injuries independently of all other causes and within ninety days? A. Yes.

3. Was such injury sustained by voluntary over-exertion? A. No.

4. Was such injury caused by lifting? A. No.

There was a direct conflict in the evidence as to whether the deceased died from disease, as alleged by the defendants, or from the result of the injury he received; and the question could not have been withdrawn from the jury. And where there is evidence on both sides proper to be submitted to the jury, their verdict once found ought to stand: *Commissioner for Railways v. Brown* (1887), 13 App. Cas. 133. Without an explanation as to how the plaintiff, when giving notice and furnishing particulars of the accident, filled in the statement, "I was helping lift a box of ice in the baggage car and strained myself in the groin," and also how in her presence Dr.

Rennie filled in the affidavit of claimant which she signed, that the injury to her husband "was caused by lifting a box of ice and strained himself," the case must have been taken from the jury and a nonsuit entered, as the policy does not cover injury caused by lifting.

The statement of the plaintiff as to what her son Homer told Applegath and Marsland, the agents of the company, when they called to see the plaintiff after the death of her husband, that his father was not injured by lifting but by slipping, and the evidence given by Homer at the trial as to how his father received the injury in his groin was the evidence offered in explanation. A Judge might not have taken the same view of that evidence, but it was evidence which could not have been withdrawn from the jury, and it cannot be said that they as reasonable men might not find as they did in answer to the third and fourth questions submitted to them.

The issue upon the question of settlement and release by the plaintiff was reserved by the learned trial Judge to be disposed of by himself. The evidence disclosed that immediately after the burial of her husband the local agent, Applegath, and Marsland, from the head office of the company, went to her house and told her the company was not liable because of the statements already referred to, that her husband was injured while lifting the ice-box. Because of the representations so made, she eventually gave up the policy to them and they presented her with a cheque for \$75, for which they took a receipt, which was set up by the company as a release.

The trial Judge held that the receipt did not constitute a release—"That on the evidence there is no doubt that the plaintiff was persuaded that she had no case whatever, and Mr. Applegath, who was present, tells us clearly that there was no suggestion to give \$75 until the policy was actually handed over, and that the \$75 was a mere gift, purely voluntary. Well, it would be absurd to say that that which is a pure gift was the consideration for a real settlement of a disputed claim. The whole thing went upon the basis there was not any claim, no pretence of a claim, but that the policy could be given up because there was no claim. Then, out of sympathy, \$75 was given. That is no consideration for a settlement, and as far as the release is concerned, I set that aside."

The evidence amply justifies the finding.

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Under clause "F" of the policy the full principal sum is not payable unless death results within ninety days from the injury. Atkinson was injured on the 12th April, and died on the 5th June; and the fifth condition provides that proofs of death must be furnished within four months from the sustaining of the injury of which the insured died; and by the ninth condition no moneys are payable until three months have elapsed from the time when proofs of death are furnished, and "no action shall be brought unless within three months from the time the right of action shall accrue."

No proof of death was furnished. The blank affidavit of claimant, which was not sworn to, was filled in after the death of Atkinson, as it is therein stated he was confined to bed from the 15th April until the 5th June (the day of his death), and was merely a disability claim for the intervening weeks between those dates.

At the close of the plaintiff's case, while Mr. McKay, counsel for the defendant, was moving for a nonsuit, the learned trial Judge said: "The motion for a nonsuit will avail you hereafter if there is no evidence to go to the jury."

Mr. McKay: "I take it, then, that all points are covered. I need not refer to them under each of the headings of the policy, under which I intend later to argue it."

After the conclusion of the evidence, and while the motion for a nonsuit was being argued, Mr. McClemon asked to amend the statement of claim so as to enable him to give evidence which would satisfy the Judge that there was a reasonable excuse for not commencing the action within the term of one year after the death of the insured. Mr. McKay objected to the amendment being allowed, saying: "If the application is allowed then I shall have to amend, to put my learned friend up against another difficulty under the policy, and that is under the limitation of time fixed for giving notice of putting in proofs of death."

HIS LORDSHIP: "That would be further considered. I do not know about that. That has nothing to do with this."

Mr. McKay: "Yes, my Lord, it has, a great deal. I preferred to rely on the limitation clause, because my learned friend had not made the application, and had not got any permission, and he would have to apply to the Court for that privilege. There are no proofs, as such, of death at all; as your Lordship will see, the two proofs that are put in before your Lordship are mere proofs of disability."

HIS LORDSHIP: "You never called for any more,—they are the forms you sent out."

Mr. McKay: "They are the proofs put in during the man's lifetime and before his death, and there being no proofs at all, then he is under the difficulty on which your Lordship will find no relief against, under clause 5 of the policy."

HIS LORDSHIP: "That is not pleaded."

Mr. McKay: "No, my Lord, because I preferred to rely on the limitation section. It is only when my learned friend makes the application he is now making——"

HIS LORDSHIP: "Within four months—that apparently relates to injury. If you gentlemen cannot agree upon the day when you say the other evidence will be taken, I will name a time now."

Mr. McKay: "I am willing to take all the evidence my learned friend has available, and if my learned friend will say that this proof, which bears on its face clear evidence it was put in within the lifetime of Robert Atkinson—the only papers before your Lordship both refer to disability, both start off as a claim by himself——"

HIS LORDSHIP: "Apparently these are the papers sent in. You say this provides that claim papers shall be sent—this declaration, for instance, of this man, shall be signed: 'I hereby declare this statement to be,' etc. You did not send in any claim papers,—you sent two men. I do not think I will make an amendment on that. I may be wrong, but I have ruled. It has no relation at all to the matter, not the slightest, not the slightest relation to any of the issues on the record."

Mr. McKay: "Then, my Lord, I would like to take one other objection to it, which has relation: that is, my learned friend cannot set this up without amending his pleadings by way of reply to ours,—he would need to apply by the statute."

HIS LORDSHIP: "I will take notice of the statute,—I will require evidence of excuse. Whether it relates back, whether I can grant the order to have it relate back, is another question."

And it was held by my brother Clute that if the defendants intended relying on the defence that proofs of death were not furnished as required by the fifth condition, it should have been pleaded. And it was also held that as the defendant company had not called for further and better proofs of death it had waived its rights. I do not consider there was any waiver of the proofs,

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because counsel was during the whole of the argument objecting that proofs of death had not been furnished. And had it not been for the ruling that there was a waiver, the plaintiff must have been nonsuited.

The forms furnished by the company and filled up by the plaintiff were in no sense proofs of death, but solely disability claims, and no mention of the death of the insured is made therein.

In *The Home Life Association of Canada v. Randall* (1899), 30 S.C.R. 97, at p. 103, Sir Henry Strong, C.J., said: "Upon the record before the learned trial Judge it was clearly an issue whether ninety days before the commencement of the action the respondent had furnished to the appellants 'satisfactory proof of a valid claim under the contract.' The course of pleading has now very much departed from the old forms of common law pleadings; substantially, however, the rules remain the same. *Probata secundum allegata* is just as much the rule as it ever was. There can be no doubt upon the plain words of the policy that delivery of proofs of a valid cause of death was an essential condition precedent which it was incumbent on the plaintiff in the action to establish both in pleading and in proof, and it was incumbent on her to shew that she had ninety days before action furnished the required proof. This requirement as to pleading was sufficiently complied with by the allegation contained in the fourth section of her pleading that she had duly furnished to the defendants proof of the death of her husband and of a claim under the contract and policy, and by the further general allegation that all conditions were performed, all things happened and all times elapsed necessary to entitle the plaintiff to be paid the sum assured. Indeed, without any reference at all to the furnishing of proofs of loss, the general mode of pleading would have been sufficient, and if it had been adopted the respondent would nevertheless have had to make out her case by proof of the performance of the conditions."

It was a condition precedent to the plaintiff's right to recover that she should establish at the trial that proofs of death were furnished to the defendant company within four months from the sustaining of the injury which caused the death of the insured. As no proofs were furnished, I would direct that the appeal be allowed and the judgment entered be set aside, and judgment entered for the defendants dismissing the action, but under the circumstances without costs.

Then as to the other branch of the case: That as the defendant company had not demanded further proof of death, it was therefore bound, according to the ruling, by the proofs already furnished. As the last so-called proof was delivered on the 7th of June, 1905, the action, according to the ninth condition, should have been brought within three months thereafter—that is, not later than the 7th of September.

No action was commenced within the three months; but on the 14th January, 1907, during the progress of the trial, an application was made to the presiding Judge for an order extending the time for commencing the action under sec. 148, sub-sec. 2, of the Insurance Act, R.S.O. ch. 203, which provides that: "Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year next after the happening of the event insured against, or within the further term of six months, by leave of a Judge of the High Court, or the Master in Chambers, upon its being shewn to his satisfaction that there was a reasonable excuse for not commencing the action or proceeding within the first mentioned term."

This section was amended by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 3, by adding thereto: "Provided that no such action or proceeding shall be commenced after the expiration of the said year and six months."

The present action was not commenced within one year of Atkinson's death—being the event insured against, nor was there any application made to a Judge for leave to commence an action within the further term of six months. But without leave the action was commenced on the 31st October, 1906, and on the 14th January, 1907, as above stated, an application was made to Mr. Justice Clute, who made an order: "That the plaintiff be at liberty to commence this action notwithstanding the lapse of time, and that the order be dated *nunc pro tunc* as if made on the day of the commencement of the action."

If the defendants desired to set up the defence under the fifth condition of the policy, it must have been specially pleaded (Rule 271), and upon issue joined thereon the burden of proof lies on the plaintiff: *Wilby v. Henman* (1834), 2 Cr. & M. 658.

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MEREDITH, C.J.C.P.:—I agree with the conclusion of my brother MacMahon that the case was properly left to the jury, and that neither their findings, nor the finding of the learned Judge on the issue as to the settlement, ought to be set aside.

The question of the effect of the conditions as to proofs of death, and that as to the time within which an action on the policy must be brought, present more difficulty.

By the terms of the policy, the appellant's liability to pay is subject to conditions which the policy declares to be "conditions precedent to the right of the insured to recover under" the policy.

The conditions which affect the questions for decision are the following:—

"(5) That written notice of any accident or injury, with full particulars thereof and full name and address of the insured, shall be given to the company immediately and under no circumstances later than five days after the accident, by leaving . . . and affirmative proof of death . . . and that the same falls within the terms of this policy shall be furnished to the company in the manner aforesaid, and to the satisfaction of the directors, within four months from the sustaining of the injury, when claim is made under clauses . . . F." (the one under which the claim is made in this case).

"(9) That no moneys shall be payable under this policy unless and until all the terms, provisions, conditions and directions contained in this policy shall have been complied with and a period of three months shall have elapsed from the time when the affirmative proof aforesaid shall have been furnished to the satisfaction of the directors, and no action shall be brought on this policy unless within three months from the time when right of action shall accrue."

That the onus of proving performance of all conditions precedent rested upon the respondent, and that if she failed to prove performance of them, except so far as any requirement of the conditions was waived by the appellants, her action failed and should have been dismissed, is not open to question: *The Home Life Association v. Randall*, 30 S.C.R. 97.

The respondent did not at the trial offer any evidence to prove that she had complied with the requirement of the condition as to furnishing proofs of death.

That requirement was, however, in my opinion, expressly

waived by Mr. McKay, who was of counsel for the appellants at the trial.

The following is an extract from the stenographer's notes of the evidence and proceedings at the trial, and it follows upon the reading by my brother Clute of the questions which he proposed to submit to the jury:—

"Any other questions suggested? I suppose there is no dispute, Mr. McKay, there is no dispute as to the formal particulars, that is the policy and the proof and the action being brought within time?

"*Mr. McKay*: There is dispute as to the action being brought within time, my Lord.

"*HIS LORDSHIP*: Do you want that submitted to the jury?

"*Mr. McKay*: My Lord, I submit there is no contest on it. It is for your Lordship to determine, but I want it determined in the action.

"*HIS LORDSHIP*: It has not been mentioned.

"*Mr. McKay*: No, my Lord, the times are mentioned, proved."

What occurred as thus detailed was, I think, an assent by Mr. McKay to the suggestion of my brother Clute that there was no dispute as to the proof, meaning, of course, the furnishing of proofs of death, and appears to me to have been a clear waiver of the requirement of the condition as to proofs of death.

Although this gets rid of one difficulty in the way of the respondent, there remains the question whether the condition as to the action being brought within three months from the time when the respondent's right of action accrued is a condition precedent, or a provision which must have been pleaded to entitle the appellants to the benefit of it, and the further questions whether the action was brought in time, and if not, whether the respondent is entitled to succeed because of the provisions of the enactments, to which I shall afterwards refer, and of the order of my brother Clute extending the time for bringing the action.

In my opinion the provision of the policy as to the time within which action must be brought is a condition precedent which the appellants were not bound to plead, and if it did not appear that the action was brought in time, that is to say, within the three months or any extension of it properly granted under the authority of the enactments referred to, the action failed and should have been dismissed.

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The next question is whether the action was brought within three months from the time when the respondent's right of action accrued. If no proofs of death were furnished, a right of action had not accrued to the respondent when the action was begun. What then is the effect of the appellants' waiver of the requirement of the conditions as to furnishing proofs of death?

The policy in effect says that it is granted on condition that no action shall be brought under it unless within three months from the time when the right of action shall accrue.

It appears to me that the respondent cannot be heard to say that the waiver of the condition as to the proofs of death amounted to any more than an admission that proofs had been furnished in accordance with the requirement of the condition, that is to say, within four months after the happening of the injury to the insured, and as by the terms of the policy the action must be brought within three months from the time when right of action shall accrue, the action was commenced too late and the respondent must fail, unless her right of action is saved by the enactments to which I have referred.

I come now to the enactments.

Section 148 of ch. 203, R.S.O., provides as follows: "(2) Notwithstanding any stipulation or agreement to the contrary, any action or proceeding against the insurer for the recovery of any claim under or by virtue of a contract of insurance of the person may be commenced at any time within the term of one year next after the happening of the event insured against, or within the further term of six months, by leave of a Judge of the High Court, or the Master in Chambers, upon its being shewn to his satisfaction that there was a reasonable excuse for not commencing the action or proceeding within the first mentioned term." And by 1 Edw. VII. ch. 21, sec. 2, sub-sec. 3, the following provision was added to sub-sec. 2 of sec. 148: "Provided that no such action or proceeding shall be commenced after the expiration of the said year and six months."

I have had doubt as to the meaning of the expression "happening of the event insured against," and was at first inclined to think that as applied to this case it meant "the accident" which occurred to the insured and according to the finding of the jury caused his death, but upon further consideration I have come to the conclusion

that the event insured against was, in this case, an event compounded of two things, the accident and the resulting death, and in this view the periods mentioned in the statute ran from the death of the insured.

The purpose of this enactment of the revised statute undoubtedly was to protect persons insured against provisions of the insurance contract unreasonably limiting the time within which an action must be brought, and the Legislature appears to have considered that in ordinary cases a year, and under special circumstances eighteen months after the happening of the event insured against was a reasonable time to allow, and it therefore in effect varies the contract of insurance by substituting for the period of limitation which it contains the periods mentioned in the enactment.

The amendment of 1st Edward is a statute of limitations pure and simple.

The respondent's action was begun on the 31st October, 1906, and the death of the insured occurred on the 5th June, 1905. The action was therefore begun after the expiration of a year, but within eighteen months from the happening of the event insured against, but leave was not obtained to bring it until it was given at the trial on the 14th January, 1907, when my brother Clute made an order giving the leave as of a date prior to the issue of the writ, and the question is whether in these circumstances the respondent's right of action is preserved and enforceable in this action.

The statute apparently contemplates that the leave must be given before the action is begun, but I desire to leave open for discussion when it arises the question whether, where the application for leave is made within the eighteen months, the leave may not be granted *nunc pro tunc* so as to save an action begun without leave. Much may be said in favour of the view that this may be done, for if not the result would be that a plaintiff must abandon the action which he had begun without leave and bring a new action.

In the case at bar, when the leave was given the eighteen months had expired, and the respondent's right of action by the terms of the contract, as varied by the revised statute, was gone, besides being barred by the amending Act.

The practice as to the renewal of a writ of summons is against the respondent's contention, for though the Court has power to enlarge the time for renewal, the practice is not to do so where if

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the summons is not renewed the plaintiff's claim would be barred by the Statute of Limitations: *Doyle v. Kaufman* (1877), 3 Q.B.D. 340; *Hewett v. Barr*, [1890] 1 Q.B. 98.

If this be the practice where the time is fixed by a rule, and not by statute, it is a *fortiori* applicable where the time is fixed by statute as it is in this case.

Authority is not needed for the proposition that where the time is fixed by statute and the statute confers no power on the Court to extend it, the rules as to enlarging time can have no application. Attempts have, however, been made to apply the rules in such cases: *Flower v. Bright* (1862), 2 J. & H. 590; *Morris v. Richards* (1881), 45 L.T. 210; *McLean v. Pinkerton* (1882), 7 A.R. 490.

I am of opinion that my brother Clute had no jurisdiction to give the leave which he assumed to give, and that the respondent's action failed because it was not begun in time.

I regret that I am compelled to reach this conclusion in a case such as this, and I regret also that the legislation was not so framed as to save the rights of a person claiming under an insurance contract where his action is begun within eighteen months and he satisfies the trial Judge that there was reasonable excuse for not bringing it within the year.

I have not referred to the contention of Mr. McClemon that the conditions are confined in their operation to claims by the insured, and do not therefore apply to a claim by the beneficiary named in the policy, nor to his contention that the insurance moneys were by the effect of sec. 159 of the Ontario Insurance Act constituted a trust fund in the hands of the appellants, and that they cannot therefore defeat the beneficiary's claim by any statute of limitations.

I am unable to agree with either contention. The policy no doubt contains in the earlier part of it a definition of the term "insured," the words "hereinafter called the insured" being inserted after the name of the deceased, and the statement of the proviso introducing the conditions is that they are conditions precedent to the right of the insured to recover, but as I have already pointed out, the proviso also states that "the policy is granted upon the following express conditions," one of which is that "no moneys shall be payable under this policy unless and until . . ."—

words covering moneys payable not to the insured only, but to any one entitled to them under the terms of the policy.

Nor do I agree that the money which the appellants contracted to pay constituted a trust fund in the hands of the appellants in the sense in which that expression was used by Mr. McClemon.

The appellants do not hold the money in trust for the beneficiary, but their liability to pay money to her is a contractual one, and is to pay it only on the terms and subject to the conditions of the policy, and the objection as to the action not being brought in time is not a defence under a statute of limitations, but taking the benefit of a term of the contract, which is a condition precedent to the right of the beneficiary as well as the insured to recover.

The result is that the appeal must be allowed without costs, and the judgment of my brother Clute, including his order extending the time for bringing the action, reversed, and judgment entered dismissing the action without costs.

TEETZEL, J.:—I agree with the conclusion that the case was properly left to the jury and that their findings and the finding of the learned trial Judge on the issue as to settlement should not be set aside; and I also agree with my Lord the Chief Justice that what took place at the trial amounted to a waiver by the appellants of the condition as to furnishing proofs of death; and I have no doubt that the words “the event insured against” in R.S.O. ch. 203, sec. 148, have reference to the death of the person insured, and not to the accident which caused his death, and consequently that the time within which this action should be brought began to run at the date of Atkinson’s death, June 5th, 1905, and not at the date of the accident, April 12th, 1905.

Sub-section 2 of sec. 148 applies to “every contract of insurance of the person,” whether such contract is an ordinary life insurance policy in which it may be said that “the event insured against” is the death of the insured from any cause, or under an accident policy such as this in which one “event insured against” is death resulting from accident.

The provision of the policy in favour of the plaintiff is that “if death results from such injuries independent of all other causes within ninety days, it (the company) will pay the full principal sum

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assured (that is, \$1,000) to his wife Margretta Atkinson if surviving," etc.

The event in respect of which the contract of indemnity is applicable is not merely the accident which produces the injuries, but the death of Atkinson from those injuries within ninety days.

Assuming the correctness of this interpretation of the contract, and the statute, the question remains as to whether the plaintiff has lost her rights by reason of non-observance of the provision of sub-sec. 2 in beginning her action.

The one year and the further term of six months expired on 5th December, 1906. The action was commenced on 31st October, 1906, without the leave of a Judge or the Master in Chambers, as provided for, and no application was made for leave *nunc pro tunc* until the trial on January 14th, 1907. Whether such leave might have been granted *nunc pro tunc* if applied for before the expiration of the one year and six months it is not necessary to decide.

In *Laming v. Gee* (1878), 10 Ch.D. 715, an application was granted at the hearing for leave which should have been obtained before the action was brought, but it does not appear in that case that it would have been too late to begin a fresh action when the application was made.

I can find no case where leave has been granted *nunc pro tunc* after the time has expired within which, with leave, a proceeding might have been taken.

The principle of the *Glengarry Controverted Election Case* (1888), 14 S.C.R. 453, is against such a proposition.

When the learned trial Judge assumed to grant leave *nunc pro tunc* it would have been beyond his authority to give leave to issue a new writ, and therefore I think it was not competent for him then to ratify the issue of a writ which had been issued without leave.

As I construe the section, both the issue of the writ and the leave of the Judge must be granted "within the further term of six months."

This is accentuated by the provision of the amending Act, which prohibits the commencing of any action after the expiration of the year and six months.

The appeal, therefore, should be allowed without costs, and the action dismissed without costs.

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Mechanics' Lien—Statement of Claimant's Residence and Description of Goods Supplied—Sufficiency of—Date of Lien—Owner—Belief in Person Being.

A claim for a lien under the Mechanics' Lien and Wage Earners Act, R.S.O. 1897, ch. 153, was made out on a printed form, and was against the contractor for the erection of certain buildings, whom the claimant believed to be, although another person was the owner. The claim was for "materials supplied" on or before a named date, no description of the materials being given and no mention being made of the commencement of the lien, words for that purpose contained in the printed form having been struck out. The claimant's residence was given as "of Toronto":—

Held (1), that the claimant's residence was sufficiently designated; (2) that the claim against the contractor was sufficient, the Act merely requiring it to be made against the owner or person believed to be the owner; (3) that it was not necessary to give the date of the commencement of the lien; and (4) that while the statement "materials supplied" was not a substantial compliance with the Act, yet under sec. 19 it did not invalidate the lien, no prejudice being occasioned thereby; and that the lien was therefore valid.

Judgment of the Master in Chambers reversed.

THIS was an appeal by the claimants, W. Spanner & Co., from an order of J. S. Cartwright, K.C., acting as an official referee, disallowing a claim for a lien filed by them in an action brought by one Barrington to enforce a lien filed by him.

The facts, so far as material, are set out in the judgment of RIDDELL, J.

On June 17th, 1908, the appeal was heard before FALCONBRIDGE, C.J.K.B., MACMAHON and RIDDELL, JJ.

R. Mackay, for the claimants.

John Jennings, for the plaintiff.

J. W. Payne, for the defendants.

June 18. The judgment of the Court was delivered by RIDDELL, J.:—The facts of this matter are: The defendants, the McBrides, are the owners of certain land in Toronto; the defendant Martin was erecting a dwelling-house on the said lands, and failed to pay those who worked for him and those who supplied him with materials. A number of claims of "mechanics' liens" were registered—amongst others, by the plaintiff and by the appellants. The matter came on for trial before Mr. Cartwright, Official Referee, and he disallowed the claim of the appellants. We have not the

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advantage of a written memorandum of the reasons of the learned referee, but we are informed that he was influenced by certain decisions in the New York courts to hold that the claim of lien of the appellants, Spanner & Co., was not sufficient.

The claim is as follows:

“The Mechanics’ and Wage Earners’ Lien Act.

“Statement of Claim.

“Spanner & Co., of Toronto, under the ‘Mechanics’ and Wage Earners’ Lien Act,’ claims a lien upon the estate of James A. Martin in the undermentioned land, in respect of the following materials, that is to say:

“To amount due for materials supplied, \$272.09, which materials were furnished for James A. Martin on or before the 28th day of December, 1907.”

[Here in the printed form are the words: “And since the day of 190 ”; but these are struck through with the pen.]

“The amount claimed as due (or to become due) is the sum of \$272.09 and \$7.00 for this lien.

“The following is a description of the land to be charged.”
[Here follows a description of the land, not complained of.]

“Dated at Toronto, this 27th day of January, A.D. 1908.

(Sd.) “W. SPANNER & Co.”

The affidavit is made by “W. J. Spanner, of the city of Toronto, manager of claimant’s company,” and the jurat is “at the city of Toronto, in the county of York.”

No less than six objections are taken by counsel to this claim:

1. The residence of the claimant is not given, as required by sec. 17 (1) (c) of the Act—some more particular address should be given.

We are not told if it would be sufficient to name the street, or whether the number should not also be given. The statute, however, does not require any such particularity; it is enough to give the residence at Toronto.

The objection is based upon a misunderstanding of the case of *Crerar v. Canadian Pacific R.W. Co.* (1903), 5 O.L.R. 383, in which it is argued by Mr. Jennings that the Chancellor laid down, or at least suggested, a rule that the street or house number should be given in cities and towns. No such rule was laid down. The

whole discussion was as to the particularity necessary under an order of the Judge that a statement of claim be amended by endorsing thereon "the particulars of the plaintiff's residence as required by the rules in that behalf."

2. Then it is said that the name of the owner of the property to be charged should be given. And the owners were the defendants the McBrides, and not the defendant Martin, whose name is given.

But the statute requires the name of the owner, or of the person whom the claimant or his agent believes to be the owner. Spanner was examined before the referee, and no evidence was given that he did not believe Martin to be the owner of the property. This will be considered more at length when we come to consider the fifth objection.

3. Next it is argued that "the time or period within which the" materials were "furnished" should appear, and the claim gives only the end, and not the beginning, of the period.

If there were any substance in this objection otherwise, it would be quite removed by a consideration of the statute itself.

Section 17 (2) provides that "the claim may be in one of the forms given in the schedule to this Act," as does sec. 49; and the form given in the schedule is precisely that adopted by the claimant. He even goes so far as to decline to adopt the form provided by the law stationer. It is true that in one case our Courts have declared a form given in an English statute wrong, as not in accordance with our statute: *Bain v. McKay* (1871), 5 P.R. 471; *cf. England v. Cowley* (1873), L.R. 8 Ex. 126, at p. 128; but we have never gone so far as to say that a form may not be used which the Legislature has said may be used; and we cannot begin now.

This objection is very strenuously urged, because of the supposed rule that nothing can be claimed in such a proceeding as this for material furnished more than a month before the registration of the claim.

This contention is based upon such cases as *Hall v. Hogg* (1890), 20 O.R. 13; and *Morris v. Thrale* (1893), 24 O.R. 159. These cases, however, are upon the statute as it was before 1896, and interpreted R.S.O. 1887, ch. 126, sec. 21, which provided that in cases other than for wages "the claim of lien may be registered before or during the progress of the work or within 30 days from

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the completion thereof or from the supplying or placing of the machinery." When the Act was recast in 1896 a new provision was made, and in the case of such a claim as this it was provided 59 Vict. ch. 35, sec. 21 (2), that "a claim for lien for materials may be registered before or during the furnishing or placing thereof or within 30 days after the furnishing or placing of the last material so furnished or placed."

As there is a similar provision for services in sec. 21 (3), it is obvious that the date of the last material being furnished or service performed is all that is of importance.

The provisions of sec. 21 (2) are continued *totidem verbis* in the R.S.O. 1897, ch. 126—sec. 22 (2), not having been modified by the amending statute of 1897, 60 Vict. ch. 24.

(4) The chief complaint is, however, that the claim for lien is alleged to be "in respect of the following materials: that is to say, to amount due for materials supplied, \$272.09," whereas the statute, sec. 17 (1) (b), requires "a short description of the . . . materials furnished or placed or to be furnished or placed."

No doubt, simply saying "materials supplied" is not even a short description of the materials supplied. It is admitted that "lumber supplied" would be sufficient, but it is clear that the Act has not been exactly complied with.

(5) It is urged that if the name of James A. Martin be advanced as that of the owner of the property, or the person whom the claimant believes to be the owner, then, Martin having no interest in the property, the claim of lien is fruitless, and therefore the appellant can claim nothing in these proceedings.

If this were the case of a conveyance or an agreement, this objection might be a grave one. Taking this and No. 2 together, it might well be argued that the claim being made was simply against the estate, if any, of Martin, and that the name of the owner, or supposed owner, does not appear at all; but everyone must be taken to know that the lien given by the statute is a lien upon the building or erection, etc., and the land occupied thereby or enjoyed therewith, etc. (sec. 4). Any one, seeing this claim, would know that the claim for the lien was against the property, no matter who owned it or had an interest in it.

Before 1896 the legislation was in such a condition as that the

Courts were often forced to allow gross injustice to be done by reason of technical slips. The remedy intended by the Act for the protection of working men and providers of materials was often burked by matters of form and not of substance. In that year the Legislature made a clean sweep of the old Acts, and recast the whole statute. And it was by sec. 18 provided that "(1) a substantial compliance with secs. 16 and 17 . . . shall only be required. And no lien shall be invalidated by reason of failure to comply with any of the requisites of secs. 16 and 17 . . . unless, in the opinion of the Court or Judge or officer who has power to try an action under this Act, the owner, contractor, or sub-contractor, mortgagee, or other person, as the case may be, is prejudiced (*sic*) thereby, and then only to the extent to which he is thereby prejudiced.

"(2) Nothing in this section contained shall be construed as dispensing with registration of the lien required by this Act." This is now R.S.O. 1897, ch. 153, sec. 19 (1) and (2).

Once have a claim of lien registered, and there may be three possible cases: (1) the claim is regular in all respects, and exactly complies with sec. 17; (2) the claim does not exactly, but it does substantially, comply with sec. 17; (3) it does not substantially comply with sec. 17.

In the first case there is no need of 19 (1); in the second case, sec. 19 (1) cures the defect, and such a claim is as valid as one in the first class, without reference to any prejudice to any one. In the third case there are other considerations. Such a claim will also be wholly valid if no prejudice is caused to certain persons by the failure to comply with the requisites, and, if there be prejudice to such persons, then the claim is invalid *pro tanto*.

It may well be argued that the words "or other person" in this section must be read on the *ejusdem generis* principle; and that they do not apply to persons other than the claimant, who are themselves, and in competition with him, claiming a lien against the property. If it were necessary to decide, I should, as at present advised, be prepared to hold that this is the correct interpretation; but, in the view I take of the case, it is not necessary to determine that point.

Assuming, then (without deciding), that the lienors, represented by Mr. Jennings, are "other persons" within the meaning of the

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Act, prejudice to whom can be considered at all; and assuming, further, that the present claim comes within the third class mentioned above, what is the prejudice?

We asked counsel what prejudice there had been or could be; and the only prejudice that he could suggest was a difficulty in inquiring, in advance of Spanner's evidence, into the accuracy of his claim—that the evidence given was such as the other lienors could not be prepared to test and meet—and the like. In short, the prejudice a litigant suffers who has not been furnished with particulars. Suppose all that to be true, and I think a very great deal too much is made of it, it happens every day at *nisi prius*, and the very simple remedy is to adjourn the hearing, if necessary, with suitable penalties imposed in fixing the costs. It was said that this would not be convenient. I do not agree; but, even if such is the case, the Courts exist for the people, and to give justice, and a mere matter of convenience must not be allowed to interfere with the rights and merits of a case. On the material brought before us there is no semblance of evidence that anyone suffered any prejudice by any defect in the claim; and upon the argument, no prejudice was even alleged in this particular case, the argument dealing entirely with generalities.

We are told that the learned referee was influenced in his decision by certain cases in the New York courts. I have read them. They lay down no general rule differing from those in our own well-known cases upon the interpretation of statutes. They interpret a statute whose wording is different and admittedly much more restricted than that of our statute. I cannot see that any assistance can be obtained in the interpretation of our statute from an interpretation placed by a foreign Court upon a statute worded differently.

The appeal should be allowed with costs, including the costs of the owners, to be paid by those opposing the appeal, and the matter referred back to the referee to deal with it on the footing that the claim of lien of Spanner & Co. is valid. We fix the costs of the appellants at \$30 and of the owners at \$20. It is easy to say, and it is true, that more attention should be paid by intending lienors to the form of their claims; but the Court is now able to do substantial justice, and the fear as to "the state of the record" is a thing of the past. It would be intolerable if persons honestly

entitled to receive money should be deprived of all chance of asserting their rights by reason of some petty—or even some grave—slip in practice; and especially so in the administration of an Act which is so clearly intended to enable the poor man to procure his wages and the supplier of materials to receive pay for his materials in a cheap, simple, and expeditious manner.

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[IN THE COURT OF APPEAL.]

IN RE THE TOWNSHIP OF SANDWICH EAST AND THE WINDSOR AND
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*Street Railways—By-law of Municipality—Passenger Fares—School Children—
Reduced Rates.*

Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tickets, ten for 25 cents, each ticket to be taken for a 3-cent fare, as above provided; working-men's special tickets, eight for 25 cents, to be taken for a 5-cent fare:—

Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school.

THIS was an appeal by the railway company from an order of the Ontario Railway and Municipal Board, under sec. 43 of the Ontario Municipal and Railway Board Act, 1906, 6 Edw. VII. ch. 31.

The order of the Board directed "that any person under twenty-one years of age, actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bonâ-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold or upon cars of the respondent's company, ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions mentioned in the first paragraph of sub-sec. (c) of sec. 15

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of by-law No. 384 of the township of Sandwich East, as set forth in schedule A, ch. 111, of 5 Edw. VII., 1905.

The contention of the railway company was that only children under the age of twelve years were entitled to ten tickets for twenty-five cents.

The facts, so far as material, are set out in the judgment of RIDDELL, J.

The appeal was heard on May 4, 1908, before Moss, C.J.O., OSLER, GARROW and MACLAREN, J.J.A., and RIDDELL, J.

A. H. Clarke, K.C., for the appellants.

J. H. Rodd, for the respondents.

The arguments sufficiently appear from the judgments.

June 19. OSLER, J.A.:—This was an appeal by the railway company from an order of the Railway and Municipal Board placing a construction upon a by-law of the township which provided for the terms upon which the company should be permitted to construct and operate an electric street railway upon certain highways of the township.

The order was made by the two lay members of the Board. No written reasons were given.

The respondents were incorporated by 4 Edw. VII. ch. 96 (O.), and the by-law in question was validated and confirmed by 5 Edw. VII. ch. 111 (O.).

The clauses of the by-law construed by the Board are those which relate to fares payable by "children" and "school children."

For the purpose of all fares (except the round trip fare, which is not to exceed twenty-five cents) three divisions are made of the line of route of the railway, and the clauses which deal with the fares, so far as they need be referred to, are:—

"(c) The cash fares to be taken by the company between the hour of six o'clock in the morning and midnight of the same day may be as follows:—For each passenger (for any distance in each of the divisions) a sum not exceeding five cents.

"Provided that every child under five years of age not occupying a seat and while accompanied by either of its parents or other person having it in charge shall be carried free.

"Provided that for every child under twelve years of age,

except as aforesaid, the fare shall not exceed three cents between each of the above divisions.

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“(d) The company may charge double the said rates of fare between the hour of midnight and six o’clock in the morning.

“(e) The company shall keep tickets for sale upon all its cars run for the carriage of passengers, and shall sell the same at the following rates:—Ordinary tickets, six for twenty-five cents, each ticket to be taken in payment of a five-cent cash fare; children and school children’s tickets, ten for twenty-five cents, each ticket to be taken in payment of a three-cent fare as above provided; workingmen’s special tickets, eight for twenty-five cents, each ticket to be taken in payment of five-cent cash fare between the hours of 6.30 and 7.30 o’clock in the morning, and between the hours of 5.30 and 6.30 o’clock in the afternoon, but such last-mentioned tickets not to be good for fare at any other time.”

The order of the Board directs:

“9. That any person under twenty-one years of age actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bonâ-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold or upon any cars of the respondent company ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions,” etc.

The provision as to the certificate is evidently taken from sec. 171 (2) of the Ontario Railway Act of 1906.

It was said that the company had entered into an agreement with the corporation to perform the terms and conditions of the by-law.

Much was said, on the argument, as to the meaning of the expression “school children,” and as to the age up to which a person could be properly described as a school child. Under the Public Schools Act, 1 Edw. VII. ch. 39, sec. 12 (3) (O.), it may seem that the public schools are for the benefit of children between the ages of five and twenty-one years, though it is only those who are between the ages of eight and fourteen years who are subject to the provisions of the Truancy Act, R.S.O. 1897, ch. 296. In other Acts other ages are mentioned in respect of certain educational purposes, and in the Ontario Railway Act of 1906, 6 Edw. VII. ch. 30,

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sec. 171 (3), in the absence of special agreement, the reduced fare for school children (there called "pupils") is confined to those under seventeen years of age actually attending school. But I regard the discussion of this point as quite beside the real question, which is what is the true construction of the by-law, and the answer to this I consider reasonably clear.

The proviso says nothing about school children, enacting merely that, subject to the immediately preceding proviso as to children under five years of age, the fare for every child under twelve years of age shall not exceed three cents between each division of the railway line. Nothing is said as to school children, but such children may, of course, in fact be school children. If nothing else were said about it in the by-law, the fare would be payable in cash. Clause (e), however, provides for an alternative, namely, by the purchase and acceptance of "children and school children's" tickets. That clause, by its very terms, has relation to the proviso, declaring, as it does, that these tickets are to be taken in payment as three-cent fare "as above provided." But children only, and not school children *eo nomine*, are "above provided" for, though the former, as I have said, may be school children.

I think the latter word is used merely as another word descriptive of the class entitled under the proviso to be carried at the reduced rate, and does not let in children above the age of twelve years merely because they happen to be school children.

I would therefore allow the appeal.

R DDELL, J.:—The Ontario Traction Company, an Ontario company, applied to the township of Sandwich East for a "franchise" or right to construct and operate an electric railway along and across certain highways in the township, and made an agreement to abide by the terms imposed by by-law No. 384, dated 14th July, 1904, which will be found printed *in extenso* as schedule A to the Ontario statute, 5 Edw. VII., ch. 111.

It was claimed by the township that the Windsor and Tecumseh Electric R.W. Co., which had succeeded to the rights and obligations of the Ontario Traction Company, failed to fulfil its obligations in certain specified particulars; and the township applied to the Ontario Municipal and Railway Board. That Board proceeded "to construe and determine the proper meaning of" the

by-law, and made an order accordingly. The railway company obtained leave from this Court to appeal from the said decision, under sec. 43 of the Ontario Railway and Municipal Board Act, 1906, 6 Edw. VII. ch. 31, and claims that the Board have erred upon a question of law.

The clauses giving rise to the difficulty are as follow:—

“(c) The cash fares to be taken by the company between the hour of six o'clock in the morning and midnight of the same day may be as follows: For each passenger, for any distance on the said railway in the same continuous route between the Pilette road in the township and any point in the city of Windsor, reached by the cars of the company, a sum not exceeding five cents; and between Pilette road and lot 129 in the first concession, a sum not exceeding five cents; and from lot 129 inclusive to the village of Tecumseh, a sum not exceeding five cents; and the round trip fare from Tecumseh to Windsor shall not exceed twenty-five cents.

“Provided that every child under five years of age not occupying a seat and while accompanied by either of its parents or other person having it in charge shall be carried free.

“Provided that for every child under twelve years of age, except as aforesaid, the fare shall not exceed three cents between each of the above divisions.

“Provided that no charge shall be made for carrying any police constable in the employ of the corporation, but such constable, when on duty and in uniform, shall be entitled to a ride free on any car run for the carriage of passengers.

“(d) The company may charge double the said rates of fare between the hour of midnight and six o'clock in the morning.

“(e) The company shall keep tickets for sale upon all its cars run for the carriage of passengers, and shall sell the same at the following rates: Ordinary tickets, six for twenty-five cents, each ticket to be taken in payment of a five-cent cash fare; children and school children's tickets, ten for twenty-five cents, each ticket to be taken in payment as three-cent fare, as above provided; workingmen's special tickets, eight for twenty-five cents, each ticket to be taken in payment of five-cent cash fare between the hours of 6.30 and 7.30 o'clock in the morning, and between the

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hours of 5.30 and 6.30 o'clock in the afternoon, but such last-mentioned tickets not to be good for fare at any other time."

The township complained that "the company has failed to fulfil its obligations respecting tickets, in that. . . .

"(b) It does not supply ten tickets for a quarter to school children.

(c) It refuses to recognize children from the township attending school in Detroit as school children.

"(d) No such tickets are kept for sale upon its cars, nor, indeed, within the limits of the township."

The Board, without any written reasons of judgment, decided "that any person under twenty-one years of age, actually attending school, upon the production of a certificate from his or her principal teacher that he or she is a *bonâ-fide* school child attending school, shall be entitled to purchase at any office where such tickets are sold, or upon any cars of the respondent company, ten tickets for twenty-five cents, such tickets to be taken in payment as fare between each of the divisions mentioned in the first paragraph of sub-sec. (c) of sec. 15 of by-law No. 384 of the township of Sandwich East, as set forth in schedule A, ch. 111 of 5 Edw. VII., 1905."

The railway company contend that only children under the age of twelve years are entitled to ten tickets for twenty-five cents, and this is the point in the appeal.

Of course, the same rules must be applied to the interpretation of this by-law (which is really the agreement between the township and the railway company) which apply to any other contract. The meaning must be arrived at from a consideration of the circumstances under which the agreement was entered into, and the language employed to express the meaning of the parties—effect must be given, if possible, to every part of the document, and all fair efforts made to have the document consistent with itself.

The argument of the respondent, in substance, is as follows:

Section (c) provides not for the fares that shall, but the fares that may, be taken. A general rule is first laid down, then there is a provision made for three classes of persons: (1) children under five not occupying a seat, but accompanied by parent or person in charge; (2) children under twelve not coming within class 1; (3) police constables in uniform.

No special provision is, in sec. (c), made for school children over twelve, nor for workingmen.

Section (e) provides for tickets; and now two classes, who have not been specially provided for in sec. (c), are taken care of, viz., school children generally and workingmen—"school children" are placed in the same category as "children"; workingmen have their special tickets at a special price.

It is contended for the respondents that both parties to this agreement recognized that there were children attending school who were over the age of twelve years, and intended that such children should not be debarred from cheap fares so long as they bought at least ten tickets—in the same way as a "workingman" would be allowed to have a much reduced rate if he bought at least eight tickets.

Any child under five may travel free; any child from five to twelve may travel on a three-cent cash payment at any time, but a child over twelve may not travel at any rate less than any one else, unless (a) he is a school child, and (b) he buys tickets. No child over twelve may claim to travel on a three-cent cash fare, any more than a "workingman" may claim to travel on a cash fare of $3\frac{1}{2}$ cents or less than 5 cents.

It is argued that it would be placing too restricted a meaning upon the expression "in payment as three-cent fare as above provided" to read it as confining the benefit of the tickets to the persons who had by a previous section the right to travel upon a three-cent cash fare.

If this conclusion is right, it would seem that the question as to who should be included under the description "school children" is one of fact, and not of law, and, consequently, the decision of the Board that all persons under twenty-one actually attending school are so included would not be applicable. Section 43 (2), which gives an appeal to the Court of Appeal, confines the right to questions of jurisdiction and of law.

If, however (the said conclusion being right), it be considered that the Court may deal with the interpretation made by the Board, I cannot say that the Board has erred, at all events in a sense of which the railway company can complain.

By the legislation in force at the time of the passing of the by-law, the assessors of every municipality were obliged to make

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a census annually of all children within the municipality between the ages of five and sixteen years and between the ages of five and twenty-one years, and a report was made by the clerk to the inspector, and to the secretary of the proper board governing schools: 4 Edw. VII. ch. 23, sec. 30; and see the form of general return, under sec. 18, in schedule E, columns 24, 25. All this was in addition to the census mentioned in sec. 29 of children between the ages of eight and fourteen, for the use of the truant officer and others. No doubt, the provisions of sec. 30 are introduced in view of "The Public Schools Act," 1901, 1 Edw. VII. ch. 39. That Act provides that "every person between the age of five and twenty-one years shall have the right to attend some school;" that in the sub-division of a township into public school sections "no section shall be formed which contains less than fifty children, between the ages of five and twenty-one years, whose parents or guardians are residents of the section, except" under certain circumstances (sec. 12 (3)); while it is "the duty of the trustees of all public schools . . . to provide adequate accommodation for all the children between the ages of five and sixteen years resident within the municipality" (or two-thirds if a rural section), according to the census, leaving out children of supporters of a separate school: sec. 65 (3).

The Separate Schools Act, again, R.S.O. 1897, ch. 294, provided for the establishment of Protestant and coloured separate schools for the benefit and largely under the control of those "sending children to" such school: secs. 5, 8, 9, 12, 13, 17; and also for Roman Catholic separate schools. In all these schools the trustees must provide adequate accommodation "for all children between the ages of five and twenty-one years belonging to the supporters of their school:" secs. 28 (8), 33 (2), 16.

It is, further, provided by the Truancy Act, R.S.O. 1897, ch. 296, that "all children between eight and fourteen years of age shall attend school for the full term the school they have the right to attend is open, unless excused or for special reasons:" secs. 2, 3, 4; and the trustees must report to the truant officer the name, age and residence of all pupils on the school register who have not attended school as required by the Act.

I take it to be plain that the persons between the age of five and twenty-one who have the right to attend some school are the

same as the children between the same ages mentioned in other parts of the statutes. All persons from five to twenty-one are called children for school purposes, and those from five to eight may, those from eight to fourteen must, and those from fourteen to twenty-one may attend school. All these are school children when they attend school; and it makes no difference of what particular age they may be or what kind of school, public or separate, they may attend. And this agrees with the ordinary meaning; for, as has been said, " 'child' is ordinarily a synonym for infant, a person under the age of twenty-one years." Stroud, *sub. voc.*

It was strongly urged that high school pupils could not be included in the category of "school children," and certain definitions were read to the Court indicating that "school" should be restricted to primary or elementary schools. I cannot assent to that proposition. No great—if any—advantage can result from a consideration of the etymology, deriving back, as it does, from the idea of "stopping" (Curtius' Principles, 5th ed., sec. 193) or "leisure," rather than "work." "In modern usage the term is applied to any place or establishment of education, as day schools, grammar-schools, academies, colleges, universities, etc.; but it is in the most familiar use restricted to places in which elementary instruction is imparted to the young." Century Dictionary, p. 5393, col. 2. This definition is well enough, if we do not unduly limit the application of the word "elementary." In our common parlance, the word is used of any place in which education is given of a character more elementary than that given in a "college" giving education of a post-matriculant character. In the term "school" are, I think, included high schools and collegiate institutes—these being high *schools* by statute. It is true that those who attend high schools are not called "children" in the Act, but "pupils"—this, however, is the name given throughout the legislation to persons in the primary schools while in the schools, and in their capacity of scholars—students—learners.

I am unable to see why those attending high schools are not just as much and as truly "school children" as those attending public or separate schools. And the same remark applies to those who, coming from or going to Detroit, attend school. I cannot think that either party to the contract had any intention of discriminating against any class of student minors.

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WINDSOR
AND
TECUMSEH
ELECTRIC
R. W. Co.

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The whole question, in my mind, is the right of children over the age of twelve years to be carried at any rate less than the ordinary adult; and in this I think that the appellants are right, and the appeal must succeed.

The by-law provides for: (1) two classes of person to be carried free; (2) the ordinary fare of five cents per division; and (3) the fare of three cents for a limited class, viz., children, *i.e.*, those over five, but under twelve years of age. There are but two rates of fare, viz., five cents and three cents for cash. These are all the provisions fixing the rate of the fare. Then comes a provision for tickets: (1) ordinary tickets; (2) children and school children's tickets; and (3) workingmen's special tickets.

The first and third are "to be taken in payment of (a) five cents cash fare"—the third, however, only during certain hours—the second ten for twenty-five cents, "each ticket to be taken in payment as three cent fare as above provided." The three-cent fare, "as above provided," is only available for a child under twelve years of age; and I do not think it could have been intended that a ticket worth or costing $2\frac{1}{2}$ cents should in the hands of any one be of more avail than three cents cash would have been. The provision is for "children and school children's tickets"—not "children's tickets and school children's tickets," or "children's and school children's tickets." The terminology, "children and school children's tickets," seems to have been adopted as a convenient expression to indicate the ticket—the one kind of ticket—which is equivalent to a three-cent cash fare, just as "workingmen's special tickets" are tickets which, during certain hours, are equivalent to a five-cent cash fare, and "ordinary tickets" are tickets which at all times are equivalent to a five-cent cash fare. It seems to me that, if it had been intended that school children over twelve years of age should be carried at any rate less than adults, an express provision would have been made therefor.

The case of *City of Hamilton v. Hamilton Street R.W. Co. (Ticket Case)* (1904), 4 O.W.R. 207, 311, 411, 6 O.W.R. 207, 8 O.L.R. 642 (1905), 10 O.L.R. 594 (1906), 39 S.C.R. 673 (and see Cases in Supreme Court, vol. 281), seems to be in point. The by-law under consideration in that case will be found printed in the Ontario Statutes for 1893, at pp. 410

et seq. It provides that “(c) the said company may charge and collect from every person . . . a sum not exceeding five cents, except children under five years of age . . . such children to ride free . . . and the company . . . shall issue workmen’s tickets at eight for twenty-five cents, good during certain “hours . . . and shall also carry children between five and twelve for a cash fare of three cents or give ten children’s tickets for twenty-five cents, and also carry free of charge all . . . constables . . .” “(b) The said company shall keep tickets for sale . . . upon their cars, and they shall sell tickets to persons desiring the same at a rate not exceeding twenty-five cents for six tickets for fare to any point. . . .” The company refused to keep tickets for sale in their cars, except those six for twenty-five cents; they claimed, also, to restrict the sale of “workmen’s tickets” to certain named classes of the community. Upon application before trial, Mr. Justice Magee ordered that the company should keep “workmen’s tickets” for sale in the cars to workmen (4 O.W.R., at p. 211), and at the trial Mr. Justice Street held that the public generally were entitled to “workmen’s tickets” (8 O.W.R., at p. 644), without regard to the occupation or want of occupation of the person desiring to use them, and that children, when going to school, were not excepted by reason of the fact that a subsequent by-law and agreement bound the company “to give to any child between five and fourteen years of age, when going to school, a ticket to go and return on the date of issue for five cents” (8 O.L.R., at p. 646).

This judgment was affirmed by the Court of Appeal: 10 O.L.R., p. 594. “They were designated ‘workmen’s tickets’ for purpose of reference only, and not because they were intended for use by some special class of citizens supposed to come under the undefined description of ‘workmen.’” And this has been affirmed by the Supreme Court: 39 S.C.R. 673.

Under this case we must hold, I think, that the “workingmen’s tickets” in the present instance are not intended solely for those who may be in reality “working men”—that the clause (e) is not introduced to give an advantage to a new set of persons not previously provided for, viz., “workingmen.” And it seems

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to follow that the proposition that clause (e) provides for the supposed new class, "school children," not previously provided for, must also fall to the ground.

I am of opinion that the appeal should be allowed with costs, including the costs of the application for leave to appeal.

MOSS, C.J.O., GARROW and MACLAREN, J.J.A., concurred.

G. F. H.

[IN CHAMBERS.]

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MCNEIL v. LEWIS BROTHERS, LIMITED.

June 13.

Discovery—Examination—Officer of Company—Attorney under Extra-Provincial Corporations Act—63 Vict. ch. 34 (O.)—Con. Rule 439 a.

An attorney appointed to represent a foreign company in Ontario, in compliance with the Act respecting the licensing of Extra-Provincial Corporations, 63 Vict. ch. 24 (O.), is an officer of the company within the meaning of Con. Rule 439 a, and may be examined under that rule.

THIS was a motion by the plaintiff to commit Mr. Vickers for refusal to be examined as an officer of the defendant company, under Con. Rule 439a, under the circumstances mentioned in the judgment, and was argued before TEETZEL, J., in Chambers, on June 12th, 1908.

C. D. Scott, for the plaintiff.

W. E. Middleton, K.C., for the defendants and Vickers.

Davies v. The Sovereign Bank (1906), 12 O.L.R. 557; and *Perrins, Limited, v. Algoma Tube Works, Limited* (1904), 8 O.L.R. 634, were referred to.

June 13. TEETZEL, J.:—Motion to commit Mr. Vickers for refusal to be examined as an officer of the defendant company under Rule 439a.*

* Con. Rule 439 (a).—"In the case of a corporation any officer or servant of such corporation may, without order, be orally examined before the trial touching the matters in question, by any party adverse in interest to the corporation. . . ."

The defendant is a foreign corporation, and by power of attorney appointed Mr. Vickers, who resides in Toronto, its true and lawful attorney, in the name and place and for the sole use and benefit of the company, to act as its attorney, and to sue and be sued, plead or be impleaded, in any court in Ontario, and on behalf of the company and in Ontario to accept service of process and receive all lawful notices, and for the purposes of the company to do all acts and execute all deeds and other instruments relating to the matters within the scope of the power of attorney.

It was argued by Mr. Middleton that Mr. Vickers was merely an agent of the company for a limited and special purpose, and was not an officer within the meaning of the rule.

I am unable to accept this view. The purpose of the power of attorney was to comply with the Act respecting the Licensing of Extra-Provincial Corporations, 63 Vict. ch. 24 (O.),* thereby enabling the company to carry on business within Ontario.

The cause of action arose within Ontario, and Mr. Vickers is the only representative of the company upon whom service of process may be effected.

Although the company is a foreign corporation, I think that, having appointed its agent in Ontario and obtained a license to do business here, it was within the contemplation of the rule.

It seems to me that a person occupying the position of Mr. Vickers, able to bind the company in the important matters provided for in the power of attorney, is necessarily an officer of the corporation. The fact that his duties and powers are limited does not prevent the application of the rule. The limitation of his authority does not affect the right of the plaintiff to examine him for discovery if he is, in fact, an officer.

The usual order will therefore be made directing Mr. Vickers to attend for examination at his own expense.

Costs of motion to plaintiffs in any event.

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* 63 Vict. ch. 24, sec. 8 (O.).—"The Lieutenant-Governor in Council may from time to time make regulations respecting the following matters, namely:—

"(a) . . .

"(b) The appointment and continuance by the corporation of a person or company as its representative in Ontario on whom service of process, notices or other proceedings may be made, and the powers to be conferred on such representative.

"(c) . . ."

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BALLENTINE V. THE ONTARIO PIPE LINE CO.

June 8.

Negligence—Independent Contractor—Liability—Natural Gas Company—Exercise of Statutory Powers—Explosion—Collateral Negligence.

The defendant company, acting within their corporate powers and under the statutory powers conferred by R.S.O. 1897, ch. 200, sec. 3, and ch. 199, sec. 22, on such companies, instructed a contractor with whom they had a contract to do such work for them, to make connection with the place of business of the plaintiff's tenant for the supply of natural gas thereto. The contractor's employees negligently allowed gas to escape while constructing a trench for the service pipe from the defendants' main line, which had been laid along a public street, thus damaging the plaintiff's property:—

Held, that the defendants were liable.

The statutory power to break up and dig trenches in streets implied the duty of seeing that the gas was not allowed negligently to escape in dangerous quantities, which duty the defendants could not rid themselves of by delegating it to another. Such negligence was not merely collateral, but was negligence in the very act the contractor was engaged to perform for the defendants.

THIS was an action tried at the Hamilton non-jury sittings, before RIDDELL, J., on May 20th, 1908.

The facts of the case and the contentions of counsel are stated in the judgment.

G. Lynch-Staunton, K.C., for the plaintiff.

J. G. Gauld, K.C., for the defendants.

JUNE 8. RIDDELL, J.:—This is an action tried before me, without a jury, at the recent Hamilton Assizes. The parties agreed upon a statement of the facts, which I here subjoin.

“The plaintiff is a retail grocer, and is the owner of the premises on the north-east corner of John and Augusta streets in the city of Hamilton, the southerly portion of the premises being occupied by the plaintiff, and the northerly portion thereof being occupied by one Gordon, a butcher.

The defendants are incorporated under the laws of the Province of Ontario, and obtained from the city of Hamilton a franchise on the 26th day of September, 1904, and being by-law No. 400, the consent, permission and authority of the city to enter upon the streets, public alleys and public grounds of the city of Hamilton, to dig trenches and lay and bury therein, and maintain, operate, and repair mains and pipes for the transportation and

supply of natural gas in the said city of Hamilton, for fuel, heating and lighting purposes.

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"The company thereupon entered into a contract with one Andrew Byrnes, a competent, careful, skilled and independent contractor, and experienced in the construction of natural gas plants, and the necessary services connected with the main lines for the purpose of supplying customers with natural gas, to furnish, construct and complete the defendants' gas plant distributing system in the city of Hamilton, according to the terms of the document produced, which was accepted by the defendant.

"While this contract with Andrew Byrnes was in force and a short time prior to the 6th day of December, 1905, the plaintiff's tenant, William Gordon, requested the defendant to make the necessary connection between the place of business of the said Gordon and the main line of the defendants, which had been laid on John street south, in front of the premises of the plaintiff and of the said Gordon, for the purpose of supplying the said Gordon with natural gas in the premises occupied by him.

"The defendants notified the said Andrew Byrnes to have the said service made in accordance with the contract existing between the defendants and the said Byrnes. The employees of the said Byrnes negligently allowed gas to escape, while constructing the necessary trench in which to lay the service pipe, and such gas finding its way into the cellar occupied by the said Gordon, became ignited with a light therein, causing an explosion, causing damage to the plaintiff's property."

The contract between the defendants and Byrnes is also put in; and it contains provisions that the defendants are to provide the necessary franchises and permits providing for the construction of the pipe lines in Hamilton; that "any injury done to persons or property during the construction of the said lines shall be borne by" Byrnes; that all of the construction work should "be done in first-class workmanlike manner, and subject to" the defendants' "inspection at all times," and that Byrnes should "conform to the inspection laws and ordinances and by-laws in force in the city of Hamilton as to the manner in which" he should "do the work and the conditions in which" he should "leave it after the same is completed"—"all the foregoing work"

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to be "done at Byrnes' sole risk and expense," and the defendants "to have the right to inspect all" his "work. . . ."

As I thought something might turn upon the precise contract made between Gordon and the defendants, I offered, on my return to Hamilton, to take any evidence upon that point (or any other) if the parties, or either of them so desired. None was offered; and the case stands as I have stated.

I have had the advantage of very careful and able arguments by counsel on both sides.

The plaintiff contends that the defendants are liable on two grounds: (1) because they were exercising statutory powers under R.S.O. 1897, ch. 199, secs. 22-29, especially sec. 26;* and (2) because they committed a nuisance by allowing the gas to escape during the installation.

The defendants contend that, having employed a competent, skilled and independent contractor to do the work required to be done in the construction of a plant in Hamilton, they are not liable to the plaintiff, and that he should seek his remedy against such contractor.

It is apparent, I think, that this is not the case of a nuisance allowed by the owner of property to exist upon his premises so as to warrant the application of the rule *sic utere tuo ut alienum non lœdas*. There was no nuisance allowed to continue to exist "as connected with a man's house or with his fixed property," as Lord Wensleydale (then Baron Parke) says, in *Knight v. Fox* (1850), 5 Ex. 721, at p. 724.

From the other point of view the case is by no means free from difficulty; and it may well be contended that the authorities are not conclusive.

Mr. Beven, in his very valuable and accurate work, *Negligence in Law* (3rd Canadian ed., 1908), in book iv., ch. 3, discusses the limitations on an employer's liability where work is done under an independent contract. He truly says (p. 597): "For a time there was an inclination to favour the proposition that a person is answerable for injury arising in executing work that he has employed another to do; and to hold that the question whether a man were contractor or servant made no difference in the liability

* See *infra*, p. 663n.

of his employer." For this proposition are cited: *Bush v. Steinman* (1799), 1 B. & P. 407; *Sly v. Edgley* (1806), 6 Esp. 6 (but "Espinasse is a notoriously untrustworthy reporter"); *Matthew v. West London Waterworks Co.* (1813), 3 Camp. 403 (Campbell is one of the best).

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The learned author continues: "The tendency then changed, and ultimately the view was adopted that limited the liability of the owner of premises to those acts which he definitely authorizes or that are in the nature of a nuisance which he permits." Very many cases are cited and considered by the learned author not confined to those dealing with the liability of the owners of land or other property; and it may be said, in general terms, that it seems to be established that where one person employs another, an independent contractor, to do an act which he himself might do, it is not the general rule that negligence upon the part of the contractor will render the employer liable. Many cases are discussed by the late Mr. Justice Gwynne in *Walker v. McMillan* (1881), 6 S.C.R. 241, pp. 275 *seq.*

I think, however, that the present case is governed by special considerations. The defendants are a corporation incorporated either under R.S.O. 1897, ch. 200, or 7 Edw. VII. ch. 34, its successor. Section 4 of R.S.O. 1897, ch. 200, is not repealed by the later Act, schedule E; and sec. 4 makes applicable to the defendants R.S.O., ch. 199 (*inter alia*), sec. 22.* The power to break up and dig trenches in streets is statutory, whether derived from sec. 3 of the ch. 200† or from sec. 22 of the ch. 199.

* R.S.O. ch. 199, sec. 22:—The company may break up, dig and trench so much and so many of the streets, squares, highways, lanes and public places of the municipalities for supplying which with gas or water, or both, the company has been incorporated, as are necessary for laying the mains and pipes to conduct the gas or water, or both, from the works of the company to the consumers thereof, doing no unnecessary damage in the premises, and taking care as far as may be to preserve a free and uninterrupted passage through the said streets, squares, highways, lanes and public places while the works are in progress.

† R.S.O. 1897, ch. 200, sec. 3:—Every such company may construct, maintain, complete and operate works for the production of steam, hot air or hot water, for purposes of power and heating, or for the production, sale and distribution of electricity or natural gas for purposes of light, heat and power, and may conduct the same by any means, through, under and along the streets, highways and public places of the city, town or other municipality; but as to such streets, highways and public places, only upon and subject to such agreement in respect thereof as shall be made between the company and the municipality and under and subject to any by-law of the council of the municipality passed in pursuance thereof.

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Cases in which there have been interferences with the highway are not uncommon.

Gray v. Pullen (1864), 5 B. & S. 970. The Metropolis Local Management Act (1855), 18 & 19 Vict. ch. 120, sec. 77, permitted any person to make a drain into any of the sewers vested in the Metropolitan Board of Works, etc., but (sec. 110) made it obligatory that he should fill in the ground again. The defendant Pullen employed the defendant Hubble to make a drain. Hubble made the drain, but left a hole or trench, into which the female plaintiff fell, with injury resulting. Upon action brought, the trial Judge, Blackburn, J., nonsuited as against Pullen, but left the case to the jury as against Hubble. Upon appeal, the Court of Queen's Bench affirmed the ruling of the trial Judge, but the Court of Exchequer Chamber reversed this ruling. In that case, however, there was the express statutory duty cast upon him who opened to close again, but Erle, C.J., in giving the judgment, in Cam. Scacc., says (p. 985): "The defendant Pullen is not excused from liability for the omission to fill up the drain properly, on the ground that he had employed a contractor to do that duty for him, and the contractor was negligent and left the duty unperformed. We think that the duty was implied in the grant of the power to open the drain in a highway in sec. 77, and was expressed in sec. 110; and that this statutable duty is created absolutely."

If I understand the judgment, it decides that the grant of a power to open the highway carries with it by implication certain duties, and the enactment specially that such duties must be performed is not necessary.

Hardaker v. Idle District Council, [1896] 1 Q.B. 335. A district council, being about to construct a sewer under their statutory powers, employed a contractor to construct it for them. In consequence of his negligence in carrying on the work, a gas main was broken, and the gas escaped into a house, and, exploding, injured the female plaintiff and damaged her husband's furniture. The negligence was in omitting to keep the gas pipe properly supported. At the trial before Wright, J., with a jury, the learned Judge held that the district council were not liable for the negligence of their contractor. Upon appeal, the Court of Appeal reversed the decision of Wright, J. Lindley, L.J., pp. 341,

342, takes the law as it is laid down by Lord Blackburn in *Dalton v. Angus* (1881), 6 A.C. 740, at p. 829: "Ever since *Quarman v. Burnett* (1840), 6 M. & W. 499, it has been considered settled law that one employing another is not liable for his collateral negligence, unless the relation of master and servant existed between them; so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor. He may bargain with the contractor that he shall perform the duty, and stipulate for an indemnity from him if it is not performed, but he cannot thereby relieve himself from liability to those injured by the failure to perform it: *Hole v. Sittingbourne and Sheerness R.W. Co.* (1861), 6 H. & N. 488; *Pickard v. Smith* (1861), 10 C.B.N.S. 470; *Tarry v. Ashton* (1876), 1 Q.B.D. 314." The Lord Justice passes, on p. 342, "to consider the duty of the district council. . . . Their duty was not only to 'construct a proper sewer,' but also to take care not to break any gas pipes which they cut under. . . . This duty was not performed." A. L. Smith, L.J., put his decision on the ground that the work was necessarily attended with risk, and (p. 346) therefore the district council could not free themselves "from liability by binding the contractor to take effectual precautions:" p. 349: "Digging under gas pipes in use must necessarily be attended with risk, unless all reasonable precautions are taken to guard against it." Rigby, L.J., says that it was the duty of the council "to use all reasonable skill and care to prevent damage to any persons arising from their operations: p. 352; "Notwithstanding," he continues, "a great conflict of judicial opinion, many dicta, and some decisions to the contrary, I consider it has always been, on the balance of authority, and is now clearly recognised as the law, that no one can get rid of such a duty by imposing it upon an independent contractor." The learned Lord Justice then goes on to say that the duty of taking proper precautions against injury to any gas pipe would (among others) be thrown by the law upon the district council.

In *The City of Halifax v. Lordly* (1892), 20 S.C.R. 505, the

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plaintiff fell over a hydrant in the city of Halifax, as she was walking along the sidewalk of a street, an electric lamp going out. The majority of the Court (Ritchie, C.J., and Gwynne and Patterson, JJ.) held (diss. Strong and Taschereau, JJ.) that the city was not, under the circumstances of the case, liable. Gwynne, J., says, however, at p. 512: "It was contended that the city" was liable "upon the principle of law that a person upon whom a liability is imposed, whether by common law or by statute, cannot absolve himself from his liability by delegating his duty to another. . . . The principle is not questioned. . . . It is not disputed that, where a particular duty is imposed upon any person as incidental to the doing of any work which he by statute is authorized to do, such person cannot by employing a contractor to do the work authorized, evade responsibility to a person injured by the non-fulfilment of the incidental duty imposed." The learned Judge points out that the city had no statutory duty to light the street nor any power to do it; they had no power but that of entering into contracts with persons able to supply the light. The succeeding sentence is, I respectfully think, too widely expressed, though quite accurate, as applied to the particular case: "The relation thus which by statutory authority was created between the council and the company was not that of master and servant or of principal and agent, but that of employer and independent contractors, and the law applicable to such a case applies—namely, that if any one suffers injury from any negligence in the execution by the contractors of the work they have undertaken, the contractors alone are responsible:" p. 513.

In the present case it is probably not of any importance that the power to break up the street was statutory; but certainly, being statutory, it was the duty of the defendants, in digging into the street to form a trench, to see to it that gas was not negligently allowed to escape, at least in such quantities that it would be dangerous. This duty they cannot rid themselves of by delegating it to another.

Nor can it be said that the negligence was, as is argued, collateral. Rigby, L.J., in the *Hardaker* case [1896], 1 Q.B. 335, at p. 352, says: "The true distinction between cases of master and servant and cases of employer and independent contractor seems to be this,

that when the person actually doing the work actually does something for which he would himself be liable, the master is, whilst the employer is not, liable for what is conveniently called 'collateral negligence,' meaning thereby negligence other than imperfect or improper performance of the work which the contractor is employed to do." So Lindley, L.J., at p. 342, says: "Their (*i.e.*, the district council's) duty in sewerage the streets was not performed by constructing a perfect sewer. Their duty was not only to do that, but also to take care not to break any gas pipe. . . . This duty was not performed. They employed a contractor to perform their duty for them, but he failed to perform it. It is impossible, I think, to regard this as a case of collateral negligence. The case is not one in which the contractor performed the district council's duty for them, but did so carelessly: the case is one in which the duty of the district council, so far as the gas pipes were concerned, was not performed at all. The case falls within the second of Lord Blackburn's propositions (in *Dalton v. Angus*), and not within the first." See also *per* Wilde, B., in *Hole v. Sittingbourne and Sheerness R.W. Co.*, 6 H. & N. 488, at p. 500.

In *Holliday v. National Telephone Co.*, [1899] 2 Q.B. 392, the defendants, a telephone company, were lawfully engaged in laying telephone wires along a street. They contracted with a plumber to connect the tubes with lead and solder. To make the connection it was necessary to obtain a flare from a benzine lamp: the lamp used was dipped into the melted solder, which would have been proper had the lamp been in good order. The safety valve of the lamp was not in working order, as the plumber should have known; the lamp, being dipped in the melted solder, exploded; and the plaintiff, passing by, was splashed by the scattered solder and injured. The deputy Judge in the City of London Court held that the plumber was not an independent contractor, and gave judgment for the plaintiff. Upon appeal, the Divisional Court, Wills and Lawrance, JJ., [1899] 1 Q.B. 221, held that the defendants were not liable, on the ground that the negligence of the contractor's servant was collateral to the execution of the work which the contractor was employed by them to do. This was reversed by the Court of Appeal, Lord Halsbury, L.C., A. L. Smith and Vaughan Williams, L.JJ., [1899] 2 Q.B. 392. A. L.

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Smith, L.J., at p. 400, says: "I do not agree that this was a mere casual and collateral negligence within the meaning of that term, for it was negligence in the very act which Highmore (the plumber) was engaged to perform." Lord Halsbury's judgment is not put explicitly on that ground. He does, however, say: "There was here an interference with a public highway, which would have been unlawful, but for the fact that it was authorized by the proper authority." The telephone company, so authorized to interfere with a public highway, are, in my opinion, bound, whether they do the work themselves or by a contractor, to take care that the public using the highway are protected against any act of negligence by a person acting for them in the execution of the work." That this duty is owed not alone to those passing along a highway is manifest by the decision in the *Hardaker* case, which also answers the objection that the damage is too remote.

Hughes v. Percival (1883), 8 App. Cas. 443; *Black v. Christchurch Finance Co.*, [1894] A.G. 48; *Penny v. Wimbledon Urban District Council*, [1898] 2 Q.B. 212, and like cases, may also be referred to.

I am not able to agree with the opinion of my brother McMahon in *Dorst v. Toronto* (1908), 11 O.W.R. 738. In that case a contractor for the city, building a sewer on Danforth avenue, had, by throwing the earth to the south side of the street, stopped up a "gully," which, with other causes, occasioned a flooding of the plaintiff's cellar. My learned brother held that this was collateral negligence. In the Divisional Court, while the judgment was affirmed, it was upon different grounds, the Chief Justice of the Exchequer Division holding that there was no duty cast upon the city to take care of a flood of the kind; my brother Anglin and myself that there was no evidence of negligence causing damage, on the part of the contractor.

It is not, perhaps, easy, and certainly not now necessary, to draw a general principle from all the cases; I think that here there was a duty cast upon the defendants, when breaking up the street, to see to it that the excavation was done in such a way as to prevent—or at least not to cause—the escape of such a quantity of gas as would or might be dangerous; that it makes no difference that the pipes to be broken or opened were those of the defendants themselves (if such was the case): *Hardaker v.*

Idle District Council, [1896] 1 Q.B., at p. 343; that they are not relieved by allowing or directing a contractor to perform their work for them; and that they are liable for the damages sustained by the plaintiff.

The parties can no doubt agree as to the damages or as to the manner of determining them; if they cannot agree, I may be spoken to.

The defendants will pay the costs.*

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* R.S.O. 1897, ch. 199, secs. 26 and 27, are as follows:—

26. The company shall make satisfaction to the owners or proprietors of buildings or other property or to the public for all damages by them sustained in or by the execution of any of the said powers, subject to which provision this Act shall be sufficient to indemnify every such company and their servants and those by them employed, for what they or any of them do in pursuance of the powers hereby granted.

27. The company shall construct and locate their gas and water works, and all apparatus and appurtenances thereunto belonging or appertaining or therewith connected and wheresoever situated, so as not to endanger the public health or safety.

END OF VOL. XVI.

APPENDIX I.

Cases reported in the Ontario Law Reports decided on appeal to the Supreme Court of Canada since the publication of volume 15 Ontario Law Reports.

FAULKNER v. GREER, 14 O.L.R. 360, 16 O.L.R. 123, affirmed 40 S.C.R. 399.

IREDALE v. LOUDON, 14 O.L.R. 17, 15 O.L.R. 286, reversed 40 S.C.R. 313.

APPENDIX II.

SUPREME COURT OF JUDICATURE.

RULES PASSED 27TH MARCH, 1908, UNDER THE CRIMINAL CODE.

1279. In all cases in which it is desired to move to quash a conviction, order, warrant or inquisition, the proceeding shall be by a notice of motion in the first instance instead of by *certiorari*, or by rule or order *nisi*.

1280. The notice of motion shall be served at least six days before the return day thereof, upon the Magistrate, Justice or Justices making the conviction or order, or issuing the warrant, or the coroner making the inquisition, and also upon the prosecutor or informant (if any), and upon the Clerk of the Peace if the proceedings have been returned to his office, and it shall specify the objections intended to be raised.

1281. Upon the notice of motion shall be endorsed a copy of Rule Number 1282 together with a notice in the following form, addressed to the Magistrate, Justice or Justices, Coroner or Clerk of the Peace as the case may be:—

“You are hereby required forthwith after service hereof to return to the Central Office at Osgoode Hall, Toronto, the conviction (or as the case may be) herein referred to, together with the information and evidence, if any, and all things touching the matter, as fully and as entirely as they remain in your custody, together with this notice.

Dated

To A. B.

Magistrate at (*or as the case may be*).

C.D.,

Solicitor for the applicant.”

1282. Upon receiving the notice so endorsed, the Magistrate, Justice or Justices, Coroner or Clerk of the Peace, shall forthwith

return to the Central Office at Osgoode Hall, Toronto, the conviction, order, warrant or inquisition, together with the information and evidence, if any, and all things touching the matter, and the notice served upon him with a certificate endorsed thereupon in the following form:—

“Pursuant to the accompanying notice I herewith return to this Honourable Court the following papers and documents, that is to say:—

- “1. The conviction (*or as the case may be*);
- “2. The information and the warrant issued thereon;
- “3. The evidence taken at the hearing;
- “4. (*Any other papers or documents touching the matter*).”

“And I hereby certify to this Honourable Court that I have above truly set forth all the papers and documents in my custody or power relating to the matter set forth in the said notice of motion.”

1283. The certificate shall have the same effect as a return to a writ of *certiorari*.

1284. The notice shall be returnable before a Judge of the High Court of Justice for Ontario sitting in Chambers.

1285. The motion shall not be entertained unless the return day thereof be within six months after the conviction, order, warrant or inquisition, or unless the applicant is shewn to have entered into a recognizance with one or more sufficient sureties in the sum of \$100 before a Justice or Justices of the County within which the conviction, order or inquisition was made or the warrant issued or before a Judge of the County Court of the said County or before a Judge of the High Court, and which recognizance with an affidavit of the due execution thereof shall be filed with the Registrar of the Court in which such motion is made or is pending, or unless the applicant is shewn to have made the deposit of the like sum of \$100, with the Registrar of the Court in which such motion is made with or upon the condition that he will prosecute such application at his own costs and charges without any wilful or affected delay and that he will pay the person in whose favour the conviction, order or other proceeding is affirmed his full costs and charges to be taxed according to the course of the Court in case the conviction, order or other proceeding is affirmed.

1286. The Judge shall have all the powers of the Court in the like matters and may order the production of papers and documents as he may deem necessary.

1287. An appeal shall lie from the order of the Judge to a Divisional Court if leave be granted by a Judge of the High Court.

1288. The Rule passed by the High Court on the 17th day of November, 1886, under the authority of 49 V., ch. 49, s. 6, (D) and all Rules and parts of Rules inconsistent with the next preceding nine Rules are hereby repealed.

These Rules shall come into force on the first day of September next.

RULES PASSED 2ND MAY, 1908.

1299. Rules 1289 to 1298 inclusive, relating to certiorari proceedings passed on Friday, the 27th day of March, 1908, and which were published in the issue of the Ontario Gazette, of 4th April, 1908, are hereby declared to be superseded and inoperative by reason of the Act of the Ontario Legislature passed at its last session embodying said Rules.

1300. Rule 1237 is hereby amended by adding thereto the words "and also in the Provinces of Alberta and Saskatchewan."

1301. Rule 168 is hereby repealed and the following substituted therefor:—

1301. (1) When a defendant is served within Ontario elsewhere than in a Provisional Judicial District, he shall appear within ten days, including the day of service.

(2) If served within a Provisional Judicial District, unless otherwise ordered under Rule 353, he shall appear within twenty days, including the day of service.

These Rules shall come into force forthwith.

HIGH COURT OF JUSTICE.

Rule passed 11th May, 1903, made under Rev. Stat. Can. 1886, ch. 129, sec. 92:—

"Rule 699 shall apply to cases under the Dominion Winding-up Act and the amendments thereto."

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APPEAL.

1. *Divisional Court — Appeal — Right of Judge to Sit on Appeal from Himself — Staying Execution Pending Appeal and Trial of Counterclaim — Ontario Judicature Act, sec. 70 (2) — Con. Rule 827 (2).*—By sec. 70 (2) of the Ontario Judicature Act, R.S.O. 1897, ch. 51, a Judge is disabled from sitting as a member of the Divisional Court hearing an appeal from a judgment or order made by himself, and he has therefore no jurisdiction, after the setting down of an appeal from his judgment, to make an order that execution shall not be stayed.

In an action for goods sold and delivered the defendant counter-claimed for trespass. The plaintiff recovered judgment at the trial of his claim, and the trial of the counterclaim was adjourned. The defendant appealed to the Divisional Court, on the ground that the amount for which the plaintiff had recovered judgment should be reduced by \$214.50 as damages for breach of warranty:—

Held, that the trial Judge had no jurisdiction to make an order on application to him under Con. Rule 827 (2) that execution should not be stayed, notwithstanding that an appeal to this Court had been set down; but that as the order was a proper one on the merits, execution should not be stayed save as to the

\$214.50, as the counterclaim was not one which should have been joined with the action, and it was not shewn that if a verdict were obtained on the counterclaim, there would be any danger of the amount not being recoverable from the plaintiff; and that, as to the \$214.50, it was proper to stay execution, notwithstanding affidavits on behalf of the plaintiff of his belief that the defendant's appeal was merely for delay, and as to his uncertainty in respect to the defendant's financial ability to pay the claim, there being no suggestion or evidence that by staying the execution to this extent the plaintiff would probably lose his claim. *Mullin v. Provincial Construction Co.*, 241.

2. *Appeal to Divisional Court of High Court—Division Court Appeal—Division Courts Act, sec. 158—Amendment—Filing Certified Copy of Proceedings—Extension of Time for—Jurisdiction.*]—A Divisional Court of the High Court, which is the Court for hearing division court appeals, has no power to extend the time limited by sec. 158 of the Division Courts Act for filing the certified copy of the proceedings in the division court, and has no power, under sub-sec. 2 of sec. 158 (as added by 4 Edw. VII. ch. 12, sec. 2), or otherwise, to extend the time for setting down the appeal until it is seised of the appeal by the filing of the certified copy, the time for filing which may be extended by the Judge in the division court. *Whalen v. Wattie*, 249.

3. *Court of Appeal—Security for Costs—Application to Dispense with—Poverty of Applicant—O.J. Act, sec. 76, Con. Rule 826.*]—Section 76 (c) of the O.J. Act, as

enacted by 4 Edw. VII. ch. 11, sec. 2 (O.)—Con. Rule 826 being to the same effect—provides that, subject to rules of Court, on appeal from a Divisional Court, . . . security, unless otherwise ordered by the Court of Appeal, shall be given for the costs of appeal.

In an action for damages under the Fatal Injuries Act, the trial Judge, being of opinion that there was no evidence to submit to the jury, dismissed the action; but directed the jury to assess the damages (which they did at \$3,500) in case it should be held on appeal that there was such evidence; and on appeal to a Divisional Court the trial Judge's finding was affirmed.

An application to a Judge of the Court of Appeal, on the ground of the alleged poverty of the appellant, to dispense with or reduce the amount of security for costs of an appeal to the Court of Appeal, was, under the circumstances, refused. *Whiteman v. Hamilton Steel and Iron Co.*, 257.

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BANKRUPTCY AND INSOLVENCY.

Assignments and Preferences—Appeal from County Court Judge—Jurisdiction—Leave to Appeal—General Words in Notice of Motion—Costs—Power to Award—R.S.O. 1897, ch. 147, sec. 20—63 Vict. ch. 17, sec. 14 (O.)—Con. Rule 1130 (1).]—A Judge of the High Court of Justice has no jurisdiction to entertain an appeal or to give leave to appeal from an order of a county court Judge as to the valuing of securities under sec. 20 of the Assignments and Preferences Act, R.S.O. 1897, ch. 147; but, under Con. Rule 784, he may refer the motion to a Judge of the Court of Appeal, who, under 63 Vict. ch. 17, sec. 14 (O.), has jurisdiction to grant leave to appeal in such a case; and *Held*, that to do so was proper in this case, in view of the general

words in the notice of motion, "or for such other order as may seem just."

Under Con. Rule 1130 (1) costs may be awarded against a party to any proceeding in the Supreme Court of Judicature for Ontario, even though there be no jurisdiction to entertain the matter. *In re Aaron Erb* (No. 1), 594.

See CERTIORARI—COMPANY, 1.

BANKS AND BANKING.

1. *Overdrawn Customer's Account—Promissory Notes—Collateral Securities—Transfer to Third Person—Inspection of Customer's Account—Bank Act, 1890, sec. 46—Interest—Compounding.*]—R., having had an account with a bank for many years previous to the 16th July, 1906, was on that day indebted to the bank in a large sum for moneys advanced, for which the bank held securities pledged to them by R. and a promissory note made by R., payable on demand, for a sum larger than the amount then due. M. had been negotiating with the bank for an assignment of the debt due by R., and had been permitted by the bank to see the entries in their books relating to that debt, and, on the day mentioned, the bank assigned to M. the sum due and all the securities held by them, covenanting that the sum named was due and to produce and exhibit their books of account and other evidence of indebtedness, etc. The pledged securities were handed over to M., and afterwards the demand note, upon which he sued R., who brought a cross-action against the bank and M. for an

account and damages and other relief:—

Held, that the bank were not prohibited by sec. 46 of the Bank Act, 1890, from allowing M., for the purposes mentioned, to inspect the account of R. with the bank; that the agreement was not invalid; that M. was entitled to succeed in his action upon the note; and that R.'s action failed.

Held, also, MEREDITH, J.A., dissenting, that the bank were not entitled to charge R. compound interest; but where the bank had made a discount or an advance for a specified time and had reserved the interest in advance, this should be allowed; in other cases, where there had been an overdraft, and payments had been made, interest should be reckoned up to the date of each payment, and the sum paid applied to the discharge of the interest in the first place, and any surplus to the discharge of so much of the principal.

Judgment of CLUTE, J., reversed. *Montgomery v. Ryan; Ryan v. Bank of Montreal and Montgomery*, 75.

2. *Security under sec. 88 of Bank Act—Assignment of—Payment of Principal Debt by Guarantor—Subrogation.*—A security acquired under section 88 of the Bank Act R.S.C. 1906, ch. 29, whereby a bank may lend money to manufacturers upon the security of goods manufactured by them is not legally assignable by the bank so as to transfer the special lien or security—conferred by that Act—to a third party. The purpose of the security is satisfied when the debt, it is given to secure, is paid to the bank.

A guarantor to a bank, which also holds such a security for the debt guaranteed, is not subrogated to the rights of the bank in the security on payment of the debt by him.

Judgment of the Master in Ordinary reversed. *Re Victor Varnish Co., Clare's Claim*, 338.

3. *Discount — Assignment of Warehouse Receipts as Security—Present Advance—Bank Act, secs. 86, 90 — Firm — Subsequent Incorporation of Company and Assignment of Business to—Evidence of Ownership — Liquidation — Parties — Estoppel.* — Before November 28th, 1904, a cream and butter business was being carried on by a married woman under the trading name of the Toronto Cream and Butter Company, her husband being the manager. On that date, with the view of opening an account with the defendants' bank, a letter was written in the trading name stating that a line of credit would be required from \$10,000 to \$12,000 secured by warehouse receipts on butter, and from \$1,000 to \$2,000 on the firm's note to be otherwise secured. In November, 1904, the account was opened and advances made by the bank, and on October 23rd, 1905, the account was overdrawn to the amount of \$10,158.01, and there was an outstanding note of \$1,700 due in November. On October 23rd the manager discounted a promissory note made under the trading name for \$6,000 at three months, and by the same name assigned to the bank as security therefor warehouse receipts of 401 cases of butter, promising also other warehouse receipts to cover the indebtedness. After placing the \$6,000 to the firm's credit

there remained a debit balance of \$4,258.01, which was gradually reduced, and on December 26th, 1905, when liquidation proceedings were taken, there was outstanding the \$6,000 note, a \$2,000 note discounted on October 27th, 1905, and an open debit balance of \$200. No attempt was ever made to draw out the \$6,000, but the manager of the bank stated that there was no restriction preventing it. The 401 cases had been warehoused on September 21st and 26th, and October 4th, 10th, and 20th, while 99 cases had been warehoused on October 20th and 21st, although no warehouse receipts had been obtained therefor, and there was nothing to shew they had ever been assigned to the bank.

The firm had been incorporated as a company by letters patent, dated April 5th, 1905, one of the objects being to acquire the business as a going concern; and by an agreement dated June 1st, 1905, made between the wife and the company, and executed by both parties, all the property, assets and good-will of the business were sold to and transferred to the company, which agreement was confirmed by a resolution of the shareholders, the husband being appointed manager, and the defendants' bank appointed the company's bank. Notwithstanding the incorporation and sale to the company, the business continued to be carried on as theretofore in the trade name, no by-laws being passed, and no stock was ever allotted to the vendor of the business, the bank not being aware of the incorporation and sale until some days after the transfer to them of the warehouse receipts:—

Held, that the business was that of the wife and not of the husband, and that there was a valid transfer by her to the company of all the firm's assets and business, so as to vest in them the title to the butter, and though the continuance of the business in the old trade name was objectionable and gave colour to the contention that there was no change in the ownership or control of the business, she was estopped from contesting the company's title thereto.

Held, also, that as to the 401 cases, the transaction was supportable, under sec. 73 of the Bank Act, 53 Vict. ch. 31 (D.), now sec. 86 of the R.S.C. 1906, ch. 29, as on the evidence there was a present advance and not a mere form to cover a past indebtedness, but that the bank had no claim to the 99 cases.

MEREDITH, J.A., dissented on the ground that the note was not "negotiated" within the 90th section of the Bank Act, at the time of the acquisition of the warehouse receipts.

Held, also, OSLER and GARROW, J.J.A., dissenting, that the bank was not entitled to hold the warehouse receipts, under the letter of November 28th, as not constituting an agreement to furnish security for advances thereafter to be made.

Ontario Bank v. O'Reilly (1906), 12 O.L.R. 420, applicable, and *Halsted v. Bank of Hamilton* (1896), 27 O.R. 435 (1897), 24 A.R. 152, 28 S.C.R. 235, distinguished.

Held, also, that the company, and not the liquidator, were the proper parties to the action.

Judgment of TEETZEL, J., at the trial, affirmed. *Toronto*

Cream and Butter Co., Ltd. v. Crown Bank, 400.

4. *Cheque Countersigned by Representative of Bank—Authority of Representative—Promise not made in Writing—Statute of Frauds* (29 Car. II. ch. 3), sec. 4—*Original Liability—Bank Act*, R. S.C. 1906, ch. 29, sec. 76.]—A firm of dealers in fruit, whose account was overdrawn at their bank, applied for further advances which the bank refused to make unless one D. was employed to look after the business, act as bookkeeper, receive all produce, and countersign cheques given for the same. D. was so employed, and represented to producers of fruit that it was safe for them to bring their produce to the factory, and that cheques given therefor countersigned by him would be paid by the bank. The plaintiff, relying on these representations, delivered peaches, for which he received the firm's cheque countersigned by D. The bank, which at the time had liens on the plant and property of the firm, through D. disposed of the whole output of the factory, including the plaintiff's goods, and received the entire profit. On the cheque being presented, the bank refused payment, upon which this action was brought:—

Held (MEREDITH, C.J., dissenting), (1) that the bank had such an interest in the goods delivered by the plaintiff as prevented the application of the 4th section of the Statute of Frauds, and were therefore bound by D.'s promise or representation that they would pay the cheque, though not made in writing.

The principle of *Sutton v. Grey*, [1894] 1 Q.B. 285, discussed and applied.

(2) That there was evidence to support the finding of the Court below, that there was an original liability on the part of the bank, on which the plaintiff was entitled to recover, on the authority of *Lakeman v. Mountstephen* (1874), 7 H.L. 17. *Simpson v. Dolan*, 459.

BENEFICIARY.

Change of—Identifying Policy.]
—See INSURANCE, 3.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

Promissory Note—Subscription for Share in Company—Fraud—Note of Subscriber Transferred to Bank—Holders in Due Course—Hypothecation of Securities—Powers of Company—By-law—Resolution—Indorsement by Secretary—Sufficiency—Negotiation of Note.]
—The defendant was induced to subscribe for one share of the stock of an incorporated manufacturing company and to give a promissory note for the amount of the par value thereof, by a false and fraudulent representation made by an agent of the company. The note shewed on its face that it was given for a share in the company, and it was indorsed to the order of the plaintiffs, a chartered bank, by an indorsement in the name of the company, with the name of the secretary thereof signed thereto. A by-law was passed by the directors of the company, and confirmed by the shareholders at an annual meeting, authorizing the borrowing of money, following the words of sec. 49 of R.S.O. 1897, ch. 191. It was also resolved by

the directors, and confirmed by the shareholders, that an account be opened with the plaintiffs; that all moneys, orders, and other securities belonging to the company and usually deposited in the ordinary course of banking be deposited in said bank account; that the same might be withdrawn therefrom by cheque, bill, or acceptance in the name of the company, over the names of any two of four specified officers (one being the secretary); and that for all purposes connected with the making of deposits in the bank account, the signature of any one of the four should be sufficient. By a memorandum over the seal of the company and the hands of three of the officers, it was agreed that the plaintiffs should hold all the company's securities at any time in the plaintiffs' possession as collateral security for present and future indebtedness; and it appeared that the note above referred to, upon which this action was brought, with a large number of others, was delivered to the plaintiffs as a collateral security, accordingly. The secretary was also a director of the company, and indorsed notes, as he indorsed that in question, almost daily, with the knowledge of his co-directors, for a year and a half:—

Held, that the by-law was sufficient to authorize the hypothecation of the company's securities to secure the present and future indebtedness of the company to the plaintiffs; that the indorsement over the signature of the secretary was sufficient to pass the property in the note to the plaintiffs; that the plaintiffs were entitled to assume that a share had been properly allotted to the defendant, and that the note represented the debt due by him to the company

for such share, and that the company had the right to negotiate it; and (upon the evidence) that the plaintiffs were holders in due course, for value, without notice of the fraud, and were entitled to recover.

Judgment of MACBETH, Co. C.J., affirmed. *Standard Bank of Canada v. Stephens*, 115.

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Proceedings before County Court Judge—Assignments and Preferences Act—R.S.O. 1897, ch. 147—Certiorari after Judgment—Discretion—Motion for Leave to Appeal.—A certiorari order may be made by a Judge of the High Court in Chambers to bring up proceedings taken before a county court Judge, under the Assignments and Preferences Act, R.S.O. 1897, ch. 147, and this notwithstanding that a right of appeal by leave of a Judge of the Court of Appeal exists under 63 Vict. ch. 17, sec. 14 (O.).

Before judgment the right to *certiorari* is absolute, but after judgment there is a judicial discretion to grant or refuse; and in such a case as the above *certiorari* should not be granted after judgment until application is first made for leave to appeal. *In re Aaron Erb* (No. 2), 597.

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COMPANY.

1. *Dominion Winding-up Act—Application of Act to Provincial Corporation.*]—The provisions of the Dominion Winding-up Act (R.S.C. 1906, ch. 144) do not apply to a company incorporated under the Ontario Companies Act unless such company is shewn to be insolvent. *In re Cramp Steel Co. (Limited)*, 230.

2. *Election of Directors—Parties.—Proxies—By-law Regulating—By-law Proper for Directors—General Power of Shareholders—R.S.O. 1907, ch. 191, sec. 47—7 Edw. VII. ch. 34, sec. 87.*]—Action by certain shareholders of a company, on behalf of themselves and all other shareholders, except the individual defendants, to have the election of the latter as directors set aside for irregularity:—

Held, that the action must be dismissed unless the plaintiffs obtained the consent of the company to sue in the company's name; as, however, the company was a party defendant and all necessary

parties before the Court, it was proper to dispose of the case on the merits, conditionally on such consent being obtained and the record amended.

Under sec. 47 of the Ontario Companies Act, R.S.O. 1897, ch. 191 (7 Edw. VII. ch. 34, sec. 87), by-laws regulating the requirements as to proxies are to be made by directors, and shall have force only until the next annual meeting of the company, and, unless confirmed thereat, shall cease to have force. The shareholders, themselves, therefore have no power to initiate and pass such a by-law at general meeting; and, in the absence of any valid by-law regulating the matter, nothing more is necessary to a proxy than valid execution by the shareholder. *Kelly et al. v. Electrical Construction Co.*, 232.

3. *Right to Guarantee Debt of Another—Ultra Vires.*]—It is *ultra vires* of a tug company, incorporated for the purpose of carrying on a general carrying, towing, wrecking, and salvage business in all its branches, to guarantee payment by the owner of a tug employed by the company of a boiler purchased by him to operate the tug. *A. R. Williams Machinery Co., Limited, v. Crawford Tug Co., Limited, and J. T. Crawford*, 245.

4. *Shares—Transfer on Company's Books—Mandamus to Enforce Transfer—Interlocutory Order.*]—The owner of two shares of stock in the defendants' railway, assigned them to the plaintiff, endorsing the assignment on the certificate. The plaintiff called at the head office and demanded that the necessary transfer should be made on the company's books, and also saw the President; and

after some correspondence, the transfer not having been made, he procured a duplicate assignment of the stock, and placed the matter in the hands of his solicitor, who thereupon wrote the company demanding a transfer, and enclosed one of the duplicate assignments, and stated that he would attend on a named hour, ready to surrender the certificate, and have the transfer completed, and, on receiving a reply that it could not then be attended to, this action was brought, in which an order for a mandamus was claimed.

An interlocutory order made by a Judge in Chambers directing a mandamus to issue, was, on appeal to the Divisional Court, set aside, and the matter left for decision at the trial. *Nelles v. Windsor, Essex and Lake Shore Rapid R.W. Co.*, 359.

5. *Acquisition of Land for Camp Grounds—Sub-division into Lots and Streets—Act Authorizing Imposition of Admission Fee—Lease of Lots—Right of Access—Admission Fee—Liability of Lessee.*—Under Letters Patent issued in 1875 incorporating the defendants, power was conferred to acquire a tract of land and to improve, sell or otherwise dispose of same in lots, plots or parcels as the by-laws might provide, which the defendants did, and by plans duly registered sub-divided it into lots with streets or avenues giving access to the lots. By sec. 6 of 47 Vict. ch. 83 (O.), the company were authorized to impose and collect an admission fee from any person seeking an entrance into "the premises occupied by the company" and those claiming under them; but such payment was not to prevent the company from excluding or ejecting any

person from the premises for disorderly conduct. In 1885 by a lease under the Short Forms Act, the company leased two of the lots for 999 years subject to the letters patent and the company's by-laws then or thereafter to be enacted, the lease containing a covenant by the lessee, on behalf of herself and her assigns, to at all times during the term to observe, keep and perform all such by-laws, etc., there being also a covenant by the company for quiet enjoyment. In 1889 the lease was assigned to the plaintiff. In 1902 a gate was placed at the entrance to the grounds, and a by-law passed requiring an admission fee or toll to be paid by all persons seeking admission to the grounds, under which the company claimed the right to demand payment thereof from the plaintiff and each adult member of his family, and by-laws were subsequently passed in 1904, 1906 and 1907 raising the amount of the fee:—

Held, that the plaintiff, by virtue of the lease, was entitled to the reasonable use of the roads, streets and avenues leading to his premises for access thereto, and though it was doubtless intended that the lessee personally, if not his lands, should be subject to some control by means of by-laws, and to charges for certain services, the power to regulate such services did not carry with it the right to impose an admission fee with the corresponding right to exclude for non-payment, etc.; and that sec. 6 of the Act was applicable to those, such as casual visitors, who merely sought an entrance to the defendants' premises or through them to the premises of others, and not to a person such as the lessee who sought an

entrance to the grounds for the purpose of reaching his own premises: *Maclaren and Meredith, J.J.A.*, dissenting.

Judgment of Mulock, C.J., Ex. D., at the trial, affirmed. *Irving v. Grimsby Park Co., Limited*, 386.

Officer of—Examination of—Extra Provincial Corporation.—See EVIDENCE.

Powers of—Subscription for Shares—Fraud.—See BILLS OF EXCHANGE AND PROMISSORY NOTES.

See BANKS AND BANKING, 3—CRIMINAL LAW, 2—NEGLIGENCE, 3,—TRUSTS AND TRUSTEES.

CONDITIONS PRECEDENT.

See INSURANCE, 3.

CONSTABLE.

Duty of.—See MUNICIPAL CORPORATIONS, 3.

CONTEMPT OF COURT.

Injunction—Disobedience of—Sequestration—Stay of Proceedings—Right of Appeal—Jurisdiction of Appellate Court—“Criminal Matter”—“Execution” and “Operation” of Judgment—Variance Between Written Reasons and Formal Order—Reasonable Construction—Practice.—The plaintiffs, by the judgment at the trial of this action, were awarded an injunction restraining the defendants from continuing to make binders and sheets in imitation of the plaintiffs', for disobedience of which the issue of a writ of sequestration against the property of the defendants for contempt of Court was, on March 28th, 1907, directed by a Judge, whose order

was subsequently confirmed by a Divisional Court.

At the time when the order for sequestration was made, an order had been made by a Judge of the Court of Appeal, who, by his reasons in writing, delivered March 4th, 1907, directed that “execution of the injunction be stayed,” pending the disposition of an appeal by the defendants from the judgment at the trial, but the formal order thereupon merely directed that “the operation of the judgment appealed from” should be stayed:—

Held, that the Court had power to entertain the appeal, and that the order directing the issue of the writ of sequestration should be set aside, on the ground that it was made at a time when there was a stay of execution of the judgment by virtue of the order of March 4th, 1907.

Per MOSS, C.J.O., and MEREDITH, J.A.:—The subject matter of the appeal was not a “criminal matter” within the meaning of the British North America Act, 1867, sec. 91, sub-sec. 27, and was not excluded from the operation of the Judicature Act and the Consolidated Rules (see Rule 4), as being matter of “practice or procedure in criminal matters.”

O'Shea v. O'Shea (1890), 15 P.D. 59, and *Ellis v. The Queen* (1892), 22 S.C.R. 7, distinguished. *Copeland - Chatterson Co., Ltd., et al. v. Business Systems Co., Ltd.*, 481.

CONTRACT.

Condition of—Loss of Goods—Notice of—Necessity for.—See RAILWAYS, 1.

Construction of.—See STREET RAILWAYS, 2.

Sale of Land.—See PRINCIPAL AND AGENT—SALE OF LAND.

With Corporation.—See MUNICIPAL CORPORATIONS, 5.

CONTRIBUTORY NEGLIGENCE.

See STREET RAILWAYS, 3.

CONTROLLERS.

Qualification of—*Declaration of.*]
—See MUNICIPAL CORPORATIONS, 2.

CONVEYANCE.

Tender of.—See SALE OF LAND, 4.

CONVICTION.

See CRIMINAL LAW, 1—INTOXICATING LIQUORS, 5.

CORPORATIONS.

See MUNICIPAL CORPORATIONS.

CORRUPT PRACTICES.

See MUNICIPAL CORPORATIONS, 5.

COSTS.

Taxation — *Witness Fees* — *Foreign Witness*—*Employee of Party to Action*—*Party as Witness.*—\$1,000, with \$510 for expenses, allowed as witness fees for a Dominion land surveyor, a necessary foreign witness, who came from the Yukon to give evidence at the trial of this action at Sandwich, involving absence from home for 51 days.

The Court refused to allow a similar sum to another witness

from the Yukon who was in the employ of the party litigant calling him: only \$630, inclusive of expenses, being allowed in his case.

When a party to an action is a necessary and material witness on his own behalf, he is entitled, if the taxing officer is satisfied of such fact, to tax for himself the same witness fees as if he were not a party, but the taxing officer can take no notice of abortive attempts to bring the case to trial. *Boyle et al. v. Rothschild et al.*, 424.

Power to Award.—See BANKRUPTCY AND INSOLVENCY.

Security for—*Poverty of Appellant.*—See APPEAL, 3.

See DEFAMATION—INTOXICATING LIQUORS, 5—WILL, 5.

COUNTY COURT.

Appeal from.—See BANKRUPTCY AND INSOLVENCY.

COURTS.

Powers of under Criminal Code.]
—See CRIMINAL LAW, 2.

See CONTEMPT OF COURT — DIVISION COURTS — SURROGATE COURTS.

COVENANT.

Implied—*Defective Roof.*—See LANDLORD AND TENANT.

CRIMINAL LAW.

1. *Conviction* — *Husband and Wife*—*Proceeding laid under Sec. 244 of Criminal Code*—*Conviction under Deserted Wives' Maintenance Act*—*Invalidity*—*Quashing Conviction.*—Where an order was made by two justices of the

peace, purporting to act under "The Deserted Wives' Maintenance Act," R.S.O. 1897, ch. 167, whereby the defendant, described as an Indian of the Six Nations, was directed to pay \$1.00 a week for his wife's maintenance; but, it appearing that the information was laid under sec. 242 of the Criminal Code, under which all proceedings were had, and that it was only at the last moment, when the justices were drawing up their minutes of the conviction, that they decided to proceed under the first named Act, without any notice thereof to the defendant, the conviction was quashed. *In re Woodruff*, 348.

2. *Master and Servant—Mining Company—Inciting Strike—Industrial Disputes Investigation Act, 1907—Construction of Statute—Excessive Penalty—Amendment—Criminal Code, sec. 1124—Powers of Court Under—Costs.*]—The Industrial Disputes Investigation Act, 1907, 6-7 Edw. VII. ch. 20 (D.), provides for a reference, in certain cases, of disputes between employers and employees to boards of conciliation and investigation; by sec. 56 prohibits strikes or lock-outs "prior to or during" such a reference; and by sec. 60 declares that "any person who incites . . . any employee to go or continue on strike contrary to the provisions" of the Act shall be guilty of an offence and liable to a fine. The defendant was convicted under the above sec. 60 of unlawfully inciting the employees of a mining company to go on strike, and adjudged to pay a fine of \$500, and in default thereof to be imprisoned for six months. At the time when the alleged offence was committed, neither the mine-owners nor their

employees had made application for the appointment of a board under the Act:—

Held, that the prohibition by the statute of strikes or lock-outs "prior to or during a reference" of the dispute to a board does not apply only to cases in which one of the parties to the dispute has made application for the appointment of such a board, but makes all strikes and lockouts illegal until there has been such a reference, and the board has made its report thereon. A strike is therefore "contrary to the provisions of the Act," before as well as after it has been invoked by either the employers or employees, and, as there was evidence to support the conviction, it must be affirmed.

As, however, the penalty of six months' imprisonment, in default of payment of the fine, was in excess of that which the magistrate had power to impose, it was reduced to three months, being the maximum term under part XV. of the Criminal Code, which, by sec. 61 of the Act, governs the procedure for enforcing penalties imposed thereunder, and the conviction was amended accordingly, without costs. *Rex v. McGuire*, 522.

DAMAGES.

Wrongful Removal of Timber from Lands—Subsequent Bonâ Fide Sale—Rights of Original Owner.]—The husband of the plaintiff conveyed certain land to his wife for valuable consideration. Previously, but without his knowledge or that of the plaintiff, certain timber was wrongfully cut and removed therefrom. The wrongdoers sold some of the timber to the defendants, who

purchased *bonâ fide*, and subsequently sold the same to another *bonâ fide* purchaser. The plaintiff thereupon brought action against these two purchasers for damages, and for a declaration that as against them she was entitled to the proceeds of the timber. The second purchaser obtained leave to pay the purchase money into court, and an issue was directed to determine the rights to it as between the plaintiff and the first purchaser:—

Held, (reversing the judgments of the Divisional Court and affirming the judgment of the trial Judge, reported 14 O.L.R. 360), that the plaintiff was entitled to recover the whole of the purchase money.

The timber was the plaintiff's property where she found it, and she might have laid hold upon it in specie subject to no right or claim of lien or recoupment on the part of the wrongdoer, and the purchaser stood in no different position.

Per MEREDITH, J.A.:—The plaintiff had at the time of the trespass no title to the timber, but an amendment of the interpleader order and issue should have been allowed, adding the husband as co-plaintiff, and such amendment should be made now. *Faulkner v. Greer*, 123.

See DEFAMATION — MOTOR VEHICLES—SALE OF LAND, 3.

DEED.

See SALE OF LAND, 2, 3.

DEFAMATION.

Words Imputing Unchastity—Absence of Averment and Proof of Special Damage—Restriction to Nominal Damages—Interlocutory

Judgment—Assessment of Damages at Trial—Libel and Slander Act—Costs.]—In an action, under sec. 5 of the Libel and Slander Act, R.S.O. 1897, ch. 68, for defamatory words spoken of a woman imputing unchastity to her, she “may recover nominal damages without averment or proof of special damage”:—

Held, in the absence of such averment and proof, only nominal damages can be recovered.

In default of a defence in such an action, being one for pecuniary damages, under Con. Rule 589, only interlocutory judgment can be entered to fix liability, the damages, even though nominal, must be assessed by the jury at the trial, and the plaintiff is therefore entitled to the costs of such trial. *Whilling v. Fleming*, 263.

DEPUTY RETURNING OFFICERS.

Right to Vote.]—See INTOXICATING LIQUORS, 3, 4.

DIRECTORS.

Election of.]—See COMPANY, 2.

DISCOVERY.

Examination of Officer of Company.]—See EVIDENCE.

DISCRETION.

Of Judge.]—See CERTIORARI.

DISTRICT JUDGE.

Powers of.]—See WATER AND WATERCOURSES, 1.

DIVISION COURTS.

Action on Foreign Note—Made and Held out of Jurisdiction—

*Place of Residence of Garnishee—R.S.O. 1897, ch. 60, sec. 190.]—*An action on a promissory note within division court competency, and which at the time the action is commenced is within the Province, may be brought in the division court in which is situate the place of residence of the garnishee, under sec. 190 of the Division Courts Act, R.S.O. 1897, ch. 60, when the maker resides in another division in the same county, although the note may have been made and the holder may reside out of the Province. *Hopper v. Willisan*, 452.

See APPEAL, 2.

DIVISIONAL COURTS.

*Right of Judge of, to Sit on Appeal from Himself.]—*See APPEAL, 1, 2.

*Right to Extend Time for Appeal from Division Court.]—*See APPEAL, 2.

ELECTION.

*Municipal.]—*See MUNICIPAL CORPORATIONS, 5.

ESTATES.

See SETTLED ESTATES—SURROGATE COURTS.

ESTOPPEL.

See BANKS AND BANKING, 3.

EVIDENCE.

*Discovery — Examination — Officer of Company — Attorney under Extra-Provincial Corporations Act—*63 Vict. ch. 34 (O.)—*Con. Rule 439 a.]—*An attorney

appointed to represent a foreign company in Ontario, in compliance with the Act respecting the licensing of Extra-Provincial Corporations, 63 Vict. ch. 24 (O.), is an officer of the company within the meaning of *Con. Rule 439 a*, and may be examined under that rule. *McNeil v. Lewis Brothers, Limited*, 652.

See INSURANCE, 2, 3—MUNICIPAL CORPORATIONS, 1, 2, 5—NEGLIGENCE, 2—STREET RAILWAYS, 2.—WILL, 4.

EXAMINATION.

See EVIDENCE.

EXECUTION.

*Staying Pending Appeal.]—*See APPEAL, 1.

EXECUTORS AND ADMINISTRATORS.

*Letters of Administration—Issue of Letters Out to Improper Surrogate Court — Validity — Surrogate Courts Act.]—*Where letters probate or of administration have issued out of a Court from which they could not properly issue under the Surrogate Courts Act, R.S.O. 1897, ch. 59, sec. 19, they are nevertheless valid unless and until revoked. *London and Western Trusts Co. v. Traders Bank of Canada*, 382.

FARES.

*Children's.]—*See STREET RAILWAYS, 4.

FIRE INSURANCE.

See INSURANCE, 1.

FOREIGN JUDGMENT.

Alimony — Arrears — Writ of Summons — Special Indorsement — Summary Judgment—Rules 138, 603.—An action lies for arrears of alimony past due upon a foreign judgment, and the claim therefor may be the subject of a special indorsement of the writ of summons under Con. Rule 138 and of a motion for summary judgment under Con. Rule 603.

Swaizie v. Swarzie (1899), 31 O.R. 324, applied and followed.

Decision of the Master in Chambers affirmed. *Robertson v. Robertson*, 170.

FRAUD.

Subscription for Shares in Company.—*See* **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

See **SALE OF LAND, 3.**

FRAUDS, STATUTE OF.

See **BANKS AND BANKING, 4—SALE OF LAND, 4.**

GARNISHEE.

Place of Residence of—Action on Foreign Note.—*See* **DIVISION COURTS.**

GUARANTEE.

See **BANKS AND BANKING, 2—COMPANY, 3.**

HIGH COURT.

Appeal to Divisional Court.—*See* **APPEAL, 1.**

See **SURROGATE COURTS.**

HOUSEHOLD GOODS.

See **WILL, 2.**

HUSBAND AND WIFE.

See **CRIMINAL LAW, 1—WILL, 5.**

INDEMNITY.

See **NEGLIGENCE, 2.**

INFANT.

See **NEGLIGENCE, 1.**

INJUNCTION.

Disobedience of.—*See* **CONTEMPT OF COURT.**

INSOLVENCY.

See **BANKRUPTCY AND INSOLVENCY.**

INSURANCE.

1. *Fire Insurance — Lease — Change in Nature of Risk—Absence of Notice or Knowledge by Landlord—3rd Statutory Condition—"Control" of Landlord—Omission to Notify Insurers.*—The judgment of a Divisional Court in favour of the plaintiffs was affirmed by the Court of Appeal (MEREDITH, J.A., dissenting), substantially for the same reasons as those appearing in the opinion of the Divisional Court delivered by BOYD, C., 13 O.L.R. 540. *London and Western Trusts Co. v. Canadian Fire Insurance Co.*, 217.

2. *Life Insurance — Changing Beneficiary—Identifying Policy—"By number or otherwise"—Extrinsic Evidence—R.S.O. 1897, ch. 203, sec. 160.*—R.S.O. 1897, ch. 203, sec. 160, "The Ontario Insurance Act" provides that the assured may vary a policy previously made so as to restrict, extend, etc., the benefits, or alter

the apportionment, *inter alia*, by a will identifying the policy by a number or otherwise.

The assured, in this case, being the holder of a beneficiary certificate in a benevolent society made payable to his wife, by his will bequeathed "out of my life insurance funds the sum of \$200 to my sister," and "all the rest, residue and remainder of my insurance funds . . . to my daughter":—

Held, that this did not sufficiently identify the beneficiary certificate above mentioned, nor was it permissible to prove by extrinsic evidence that the testator must have referred to it as he held no other policies.

Re Cheesborough (1897), 30 O.R. 639, specially discussed.

Semble, even were it otherwise, the widow's claim would have been good to the extent of the \$200 assumed to be bequeathed to the sister. *In re Cochrane*, 328.

3. *Accident Policy*—*R.S.O.* 1897, ch. 203, secs. 148 (2), 159—*Construction of Statute*—"Happening of the Event Insured Against"—*Commencement of Action*—*Leave Given by Judge after Lapse of Time*—*Nunc Pro Tunc*—*Condition Precedent*—*Pleading*—*Evidence*—*Verdict of Jury*—*Beneficiary*.]—An action brought by the widow of a deceased person, on an accident insurance policy issued to him by the defendants, was commenced more than one year, but less than one year and six months, after his death, without the leave required by the Ontario Insurance Act, sec. 148 (2). Leave was, however, granted by the trial Judge after the expiry of eighteen months from the death, the order being dated *nunc pro tunc* as if made on

the date of the commencement of the action:—

Held, (1) that the words, "happening of the event insured against," in the statute, had reference to the death of the person insured, and not to the accident which caused his death, and, consequently, the time within which the action should be brought began to run at the date of his death.

(2) The trial Judge had no jurisdiction to give leave to the plaintiff to commence her action by his order made at the trial, as it was then more than eighteen months after the death, and the plaintiff's action failed because it was not begun in time.

There was a direct conflict in the evidence as to whether deceased died from disease, as alleged by the defendants, or from the result of the injury he received, and there was also a question as to whether the plaintiff's own evidence did not support the conclusion that the injury was sustained by the deceased while lifting, in which case it would not be covered by the policy. There was other evidence, however, tending to explain this circumstance, and to establish that the injury was caused, not by lifting, but by slipping, and the jury found in favour of the plaintiff on the questions submitted to them on these points:—

Held, that the case was properly left to the jury, and that where there is evidence on both sides properly submitted to the jury, the verdict of the jury, once found, ought to stand.

Commissioner for Railways v. Brown (1887), 13 App. Cas. 133, followed.

Held, also, that the defendants were not bound to plead the fail-

ure of the plaintiff to comply with the condition of the policy requiring the action to be brought within three months from the time when the right of action accrued, as it was by the terms of the policy a condition "precedent to the right of the insured to recover" thereunder, and the onus lay upon the plaintiff to shew that her action was brought in time.

Home Life Association of Canada v. Randall (1899), 30 S.C.R. 97, followed.

Judgment of Clute, J., including his order extending the time for bringing the action, reversed. *Atkinson v. Dominion of Canada Guarantee and Accident Co.*, 619.

INTEREST.

Compounding.] — See BANKS AND BANKING, 1.

INTERLOCUTORY JUDGMENT.

See DEFAMATION.

INTERLOCUTORY ORDER.

See COMPANY, 4.

INTOXICATING LIQUORS.

1. *Local Option By-law—Municipal Corporations — Requisite Three-fifths Majority Obtained—Two Weeks Allowed for Scrutiny—Final Passing by Council Before Expiry Thereof—Refusal to Quash—Irregularities in Voting—Voters Depositing Ballots in Box—Publication of Notice—Computation of Time for—Council, whether Lawfully Constituted—Right to Inquire into—Knowledge of Council as to*

Required Majority—Necessity for—Ballot Boxes—Use of, for Voting for Other Objects—Voters' Lists, Preparation of—Containing More than Requisite Number of Voters—Appointment of Deputy Returning Officers and Poll Clerks—Illiterate Voters—Marking of Ballots—Irregularity—Result of Vote Not Affected—Oath, Useless Form of—Effect of—Public Harbour, Application of By-law to—By-law, Publication of—Whether True Copy—Words, Meaning of.]—By sub-sec.

(1) of sec. 141 of the Liquor License Act, R.S.O. 1897, ch. 245, the Municipal Council may pass a local option by-law, provided that before the final passing thereof it has been approved by the electors "in the manner provided by the sections in that behalf of the Municipal Act"; but by sec. 24 of 6 Edw. VII. ch. 47 (O.), if three-fifths of the electors voting on the by-law approve of it, the council shall within six weeks thereafter finally pass it, and that the duty so imposed may be enforced by mandamus or otherwise.

A local option by-law was submitted to the electors of the town of Midland, and, on the day following the voting, the clerk of the council declared the result of the voting, which was in its favour by the requisite majority. A week after, the council purported to finally pass the by-law.

Per OSLER and GARROW, J.J.A., in the Court of Appeal:—The provisions of the Municipal Act, as contained in secs. 369-374 as to the ascertainment by the clerk of the result of the voting and as to the right to a scrutiny apply to a by-law of this kind; and, therefore, the by-law should not be finally passed by the council until the expiration of the two weeks next after the clerk has declared

the result of the voting, but there being here the requisite three-fifths majority, and no attempt made to obtain a scrutiny, the only objection made being as to the faulty third reading, the passing of the by-law being a purely formal and ministerial act only, which the council could be compelled to do, nothing would be gained by quashing it.

Per MACLAREN and MEREDITH, J.J.A.:—The by-law could properly be passed by the council at any time within the six weeks, notwithstanding the non-expiry of the two weeks allowed for the scrutiny, so long as there was the three-fifths majority, there being nothing to prevent a scrutiny being had afterwards.

Moss, C.J.O., agreed in the result.

Judgment of the Divisional Court affirmed, and that of MULLOCK, C.J., reversed.

Held, by the Divisional Court, BRITTON, J., concurring in the result:—

(1) No proceedings after the polling, such as summing up the votes, or a declaration by the clerk of the result of the voting are necessary.

(2) Where a voter, instead of handing the ballot paper to the deputy returning officer, puts it into the box himself, but with the officer's approval, the vote is not invalidated.

(3) In computing the three weeks required for the publication of the by-law, the word "week" is used in its ordinary signification, and includes Sundays and holidays.

Re Armour and Township of Onondaga (1907), 14 O.L.R. 606, approved of.

(4) The question whether the council, when it passed the by-law, was properly constituted or not, will not be considered on a motion to quash.

Re Vandyke and Village of Grimsby (1906), 12 O.L.R. 211, followed.

(5) Knowledge by the council, when finally passing the by-law, that the three-fifths majority has been obtained, is not essential.

(6) The ballot-boxes used for voting on the by-law can properly be used for concurrent voting for other objects, the Act in no way restricting their use to voting on the by-law only.

(7) Objections, that the voters' lists were not properly prepared; that the list for one of the polling divisions contained more than the requisite number of voters; and that certain deputy returning officers and poll clerks were not properly appointed, were overruled.

(8) The declaration of inability to read or physical incapacity to mark the ballot is a pre-requisite to open voting, and its absence invalidates the vote, even though it is done with the consent of the scrutineers for and against the by-law; but the defect was immaterial, for, even if struck off, the result here would not have been affected.

(9) A voter is not to be deprived of his vote by reason of the submission to him by the deputy returning officer of a useless form of oath.

(10) The fact that a public harbour, which is subject to the legislative authority of the Dominion, was within the territorial limits of the township does not necessarily raise the presumption that the

council intended the by-law to apply thereto, even assuming that the council had not power to do so.

(11) The copy of the by-law as advertized was: "In every tavern, inn or other house of public entertainment," omitting the words "or place" between the words "other house" and "public entertainment," which were contained in the original by-law:—

Held, that the phrases "tavern, inn or house or place of public entertainment" and "houses of entertainment" were equivalent terms, and an objection that the copy published was not a true copy was overruled. *In re Duncan and the Town of Midland*, 132.

2. *Liquor License Act—Municipal Corporations — By-law Increasing License Fees—Effect of—Prohibition or Monopoly—Bona Fides.*]—Under 6 Edw. VII. ch. 47, sec. 10 (O.), amending the Liquor License Act, R.S.O. 1897, ch. 245, the license duties were increased, the duties imposed being, in cities of a population of over 100,000, \$1,200 for a tavern and \$1,000 for a shop license; in cities of a population of 10,000 only, and towns of over 5,000 and not more than 10,000, \$450 for a tavern and shop license respectively. By sec. 11, the council of any municipality, with the approval of the electors, could increase the above amounts; but by sub-sec. 5, where in cities there had been an increase made by the Act, no further increase should be made.

In a town with a population of about 7,000, the council, with the electors' approval, passed a by-law increasing the amount to be paid for a tavern license to \$2,500:—

Held, that the validity of the

by-law was dependent on the good faith of the council in passing it, and it being apparent that the object was not with regard to the continuance of the business, but either to altogether prohibit it, or to so restrict it as to create a monopoly, the by-law was bad, and must be quashed. *Rowland v. Town of Collingwood*, 272.

3. *Local Option By-law—Scrutiny of Ballots—Finality of Voters' List—Right of Deputy Returning Officers and Poll Clerks to Vote—Ontario Voters' List Act—7 Edw. VII. ch. 4, sec. 24 (O.)—R.S.O. 1897, ch. 245—6 Edw. VII. ch. 47 (O.)—Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19, secs. 369, 371 (O.)*—Under sec. 24 of the Ontario Voters' List Act, 7 Edw. VII. ch. 4, the voters' lists finally settled by the Judge are, upon a scrutiny, conclusive evidence that all persons named therein, and none others, are qualified to vote on a local option by-law, under the Liquor License Act, R.S.O. 1897, ch. 245, as amended by 6 Edw. VII. ch. 47 (O.), except as therein mentioned, and therefore no evidence can be then given, touching alienage, or minority of any voters named therein, or as to whether the name of a married woman is properly on the list or not.

Deputy returning officers and poll clerks are entitled, if qualified otherwise, to vote on such a by-law, if their names appear on the voters' list certified by the Judge and transmitted to the clerk of the peace. They may vote at the place where they act, though it be not their proper polling division.

In re Armour and Township of Onondaga (1907), 14 O.L.R. 606, 610, not followed.

As the law now stands under

the present Voters' List Act, 7 Edw. VII. ch. 4 (O.), "scrutiny" of ballots cast on such a proposed by-law, within the meaning of sec. 369. of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), is something different and more comprehensive than a simple recount. The extent of it is to be measured by what can be done on inspection of the ballot papers and the ascertainment of what votes are void *ex facie*, and the scope of investigation contemplated by the exceptions to the finality of the voters' list in 7 Edw. VII. ch. 4, sec. 24 (O.).

A person who is a resident in the municipality in which a local option by-law is proposed and an elector therein has a *locus standi* to move for a prohibition to the county court Judge in respect to a scrutiny of the ballots at the voting.

The certifying of the result of such a scrutiny under sec. 371 of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), is a judicial and not a merely ministerial act, and the Judge may be prohibited from allowing his certificate of the result to be affected by any matter which he should not have considered in arriving at the result, to this extent that if he was not justified, in arriving at the result, in entering into the consideration of the qualifications of the voters, he may be prohibited from allowing these matters to affect his certificate. *In re Local Option By-law of the Township of Saltfleet*, 293.

4. *Local Option By-law—Deputy Returning Officer and Poll Clerks—Right to Vote and Take Oath—By-law Passed Before Expiration of Two Weeks for Scrutiny—Subsequent Passing.*—Section 141 of the

Liquor License Act, R.S.O. 1897, ch. 245, enacts that the council of every township may pass a prohibitory by-law, known as a local option by-law, provided that before the final passing thereof it has been duly approved of by the electors in the manner provided by the section of the Municipal Act in that behalf:—

Held, that the fact that such a by-law was read a third time before the expiration of the two weeks allowed for a scrutiny was immaterial, where, after such two weeks, and within the time limited for its passing, the by-law was read and finally passed.

Deputy returning and poll clerks are entitled to vote on such by-laws, under sec. 347 of the Municipal Act, and can properly take the oath, which may be required to be taken by persons claiming to vote thereon.

Re Local Option By-law of Township of Saltfleet, ante p. 293, followed.

Re Armour and Township of Onondaga, 14 O.L.R. 606, not followed. *In re Joyce and the Township of Pittsburg*, 380.

5. *Sale of Liquor near Public Works—Liquor License Act—Police Magistrate—Justices of the Peace—Jurisdiction—Conviction—Form of—Irregularity—Costs—R.S.O. 1897, ch. 245, sec. 49—Ibid. ch. 39.*—In areas wherein R.S.O. 1897, ch. 39, an Act respecting the sale of intoxicating liquors near public works, is in force, a person who sells liquor without license may be proceeded against either under that Act or under the general Liquor License Act, R.S.O. 1897, ch. 245. It is optional to proceed under either one Act or the other,

with this proviso, that the offender shall not be punished twice for the same illegal sale.

The fact that a man is a police magistrate does not debar him from calling in another justice of the peace to sit with him, and there is nothing to oust the general jurisdiction of justices in the fact that a stipendiary magistrate has been appointed for the district.

The omission to ascertain the costs and insert the amount in a conviction under the Liquor License Act, R.S.O. 1897, ch. 245, sec. 49, is only a irregularity and not a fatal defect, and may be afterwards rectified by the same justices if it is sought to enforce payment of the costs.

Seemle, that under the proper construction of sec. 49 of the Liquor License Act, it is not necessary to negative the excepted cases in a conviction under that section.

Seemle, that reducing the evidence of witnesses to writing and tendering the same to them to be signed by them, though details which it is better not to disregard, are not essential to the validity of a conviction under the Liquor License Act. *Rex v. Irwin, Rex v. Pettit*, 454.

6. *Liquor License Act—Municipal Corporations—By-law to Reduce Number of Licenses—Construction of Statutes and By-laws—Unauthorized Limitation—Ultra Vires—Meaning of "Year."*—By sub-sec. 1 of sec. 20 of the Liquor License Act, R.S.O. 1897, ch. 245, the council of every city is authorized by by-law passed before the 1st of March in any year to limit the number of tavern licenses to be issued therein for the then ensuing license year,

beginning on the 1st day of May, or for any future license year until such by-law is altered or repealed, provided such limit is within the limit imposed by the Act. Under the authority of this sub-section, the municipal council of the city of Toronto, on February 22nd, 1904, passed a by-law, the second section of which provided that "the number of tavern licenses to be issued shall not exceed the number of one hundred and fifty in any one year." On January 27th, 1908, the council passed a by-law, intituled "A by-law to reduce the number of tavern licenses to 110," the effect of which was to amend the second section of the first by-law, so that it would read: "The number of tavern licenses to be issued shall not exceed the number of 110 in any one year." The number of licenses issued by the License Commissioners for the license year commencing on May 1st, 1907, was 144, but under sec. 8, sub-sec. 3, of the Act, they had authority, if special grounds were shewn, to issue the six unissued licenses at any time before 1st May, 1908:—

Held (RIDDELL, J., dissenting), that the council by the by-law of 27th January, 1908, had, in effect, assumed to limit the number of licenses which the License Commissioners had authority to issue for the license year beginning on the 1st May, 1907, and that the by-law was therefore *ultra vires*, and should be quashed. *In re Hassard and City of Toronto*, 500.

See MUNICIPAL CORPORATIONS, 4.

IRREGULARITY.

See INTOXICATING LIQUORS, 1, 5.

JUDGE.

*Of High Court—Right to Enter-
tain Appeal from Order of County
Judge as to Value of Securities.]—
See BANKRUPTCY AND INSOLV-
ENCY.*

*Of High Court—Assignment and
Preferences Act—Proceedings Be-
fore County Judge—Right to Issue
Certiorari.]—See CERTIORARI.*

*Right to Sit in Appeal from
Himself.]—See APPEAL, 1.*

JUDGMENT.

*Certiorari After.]—See CERTIOR-
ARI.*

*Execution and Operation of.]—
See CONTEMPT OF COURT.*

*Interlocutory.]—See DEFAMA-
TION.*

*See FOREIGN JUDGMENT—SALE
OF LAND, 1.*

JURISDICTION.

See DIVISION COURTS.

JUSTICES OF THE PEACE.

See INTOXICATING LIQUORS, 5.

JURY.

*Verdict of, Effect of.]—See IN-
SURANCE, 3.*

KNOWLEDGE.

*See INSURANCE, 1—SALE OF
LAND, 1.*

LABOUR.

*Industrial Disputes Act.]—See
CRIMINAL LAW, 2.*

LAND.

*Sale of.]—See PRINCIPAL AND
AGENT — SALE OF LAND, 1 —
VENDOR AND PURCHASER.*

LANDLORD AND TENANT.

*Defective Roof—Demise of Part
of Premises—Implied Covenant for
Repair.]—There is no implied
covenant on the part of a land-
lord to protect a tenant of the
ground floor against water per-
colating through a defective roof.
A tenant taking part of a building,
in other parts of which are defects
likely to result in damage to him,
should examine the premises and
contract for the removal of such
defects as are apparent, other-
wise he will have no remedy
afterwards against the landlord
for damage caused by such de-
fects.*

*Rogers v. Sorell (1903), 14 Man.
R. 450, specially referred to.
Barker v. Ferguson, 252.*

*Tenant for Life—Invalid Lease.]
—See SETTLED ESTATES.*

See COMPANY, 5—INSURANCE, 1.

LIBEL.

See DEFAMATION.

LIEN.

See MECHANICS' LIEN.

LIFE INSURANCE.

See INSURANCE, 2.

LIQUOR LICENSE ACT.

See INTOXICATING LIQUORS.

LOCAL OPTION.

See INTOXICATING LIQUORS, 1.
3, 4, 6—MUNICIPAL CORPORATIONS, 4.

LOCK-UP.

Obligation to Keep Properly Heated.]—See MUNICIPAL CORPORATIONS, 3.

MACHINE.

Dangerous.]—See NEGLIGENCE, 1.

MANDAMUS.

See COMPANY, 4—WATER AND WATERCOURSES, 1.

MASTER AND SERVANT.

Workmen's Compensation for Injuries Act—Notice of Injury Given too Late—Notice by Defendant as to—"Hearing of the Action"—When said to Begin—R.S.O., ch. 160, secs. 9 and 14.]—In an action under the Workmen's Compensation for Injuries Act (R.S.O., 1897, ch. 160), the notice of the injury required by sec. 9 of the Act was given ten days too late, and the want of notice was pleaded by the defendant. The case first came up for trial on 23rd January, 1908, when it was put at the foot of the list, by direction of the Court, and on the same day the defendant served notice, under sec. 14 of the Act, that he intended to rely for a defence on the want of notice. The case came on again for hearing in due course on 27th January, when it was again postponed, on payment of costs of the day by the defendant, who was not ready to proceed, and the case was ulti-

mately tried on the 14th February:—

Held, that in this particular case the "seven days" required by the statute were to be reckoned backwards from the 27th January, when the plaintiff was ready to go on with the trial, and that the notice served on 23rd January was therefore too late.

Semble, that the statutory phrase, "seven days before the hearing of the action," is to be read as referring to the day originally fixed for the trial, and not to any adjourned day or to the day of actual hearing, and that therefore the hearing of the action began on the 23rd January, when the parties appeared, and the case was put at the foot of the list. *Potter v. McCann*, 535.

See CRIMINAL LAW, 2—MOTOR VEHICLES—MUNICIPAL CORPORATIONS, 3.

MASTER IN CHAMBERS.

Powers of.]—See MUNICIPAL CORPORATIONS, 1, 5.

MECHANICS' LIEN.

Statement of Claimant's Residence and Description of Goods Supplied—Sufficiency of—Date of Lien—Owner—Belief in Person Being.]—A claim for a lien under the Mechanics' Lien and Wage Earners Act, R.S.O. 1897, ch. 153, was made out on a printed form, and was against the contractor for the erection of certain buildings, whom the claimant believed to be, although another person was the owner. The claim was for "materials supplied" on or before a named date, no description of the material being given and no mention being made

of the commencement of the lien, words for that purpose contained in the printed form having been struck out. The claimant's residence was given as "of Toronto":—

Held (1), that the claimant's residence was sufficiently designated; (2) that the claim against the contractor was sufficient, the Act merely requiring it to be made against the owner or person believed to be the owner; (3) that it was not necessary to give the date of the commencement of the lien; and (4) that while the statement "materials supplied" was not a substantial compliance with the Act, yet under sec. 19 it did not invalidate the lien, no prejudice being occasioned thereby; and that the lien was therefore valid.

Judgment of the Master in Chambers reversed. *Barrington v. Martin*, 635.

MISREPRESENTATION.

See SALE OF LAND, 1, 4.

MISTAKE.

See SALE OF LAND, 4.

MONOPOLY.

See INTOXICATING LIQUORS, 2.

MORTMAIN.

See WILL, 4.

MOTOR VEHICLES.

Automobiles—Negligence—Onus—Responsibility of Owner—Spec-

ial Act—6 Edw. VII. ch. 46 (O.)—Chauffeur on Errand of his own—Fines and Penalties—Action for Damages.]—A chauffeur, having received permission to have his master's motor for a few minutes in order to take some things to to the house of a fellow servant, at the request of the daughters of the latter, took them for a ride, and, on returning with them to their father's house, injured the plaintiff. The jury held that the defendant had not proved that the accident did not arise through the chauffeur's negligence, and, also, that the latter was acting within the general scope of his employment at the time of the accident:—

Held, that, having regard to the terms of 6 Edw. VII. ch. 46 (O.) (an Act to regulate the speed and operation of motor vehicles on highways), which casts the onus on the defendant when his motor has occasioned an accident, and makes him responsible for any violation of the Act, there was enough evidence to support the findings.

Semble, that under the Act the chauffeur is to be regarded as the *alter ego* of the proprietor, and the latter is liable for his negligence in all cases when the use of the vehicle is with permission, though he may be out on an errand of his own.

Semble, also, that under sec. 13 the owner of a motor vehicle for whom a permit is issued is responsible not only in regard to fines and penalties imposed by the Act, but also in damages, for any violation of the Act or of any regulation provided by order of the Lieutenant-Governor in Council. *Mattei v. Gillies*, 558.

MUNICIPAL CORPORATIONS.

1. *Quo Warranto Proceedings—Cross-examination on Affidavits—Master in Chambers—Powers of.*]

—In proceedings instituted under the Con. Mun. Act, 1903, 3 Edw. VII. ch. 19 (O.), to unseat a member of a municipal council, the cross-examination of affiants on their affidavits can only be had on leave obtained therefor from the Judge or Master in Chambers or the officer before whom the proceedings are being carried on, who must take such cross-examination himself, no authority being conferred on him to direct any one else to do so. *Rex ex rel. Beck v. Sharp*, 267.

2. *Controllers — Qualification for Office—Declaration of Qualification—Commissioner for Taking Oaths and Affidavits—Consolidated Municipal Act and Amendments—Canada Evidence Act.*—The statutory declaration as to the possession of the necessary qualification for office required by sec. 129, sub-sec. 3 (a), of the Consolidated Municipal Act, 1903, 3 Edw. VII. ch. 19 (O.), as amended by 4 Edw. VII. ch. 22, sec. 4 (O.), from every candidate for the office of mayor, reeve, etc., in cities, etc., may be made before a commissioner for taking affidavits, and need not be expressed in the form of a statutory declaration under the Canada Evidence Act, R.S.C. 1906, ch. 145, sec. 36. Section 315 of the first mentioned Act, which requires the head and other members of the council and the subordinate officers of every municipality to make their declaration of office and qualification "before some Court, Judge, police magistrate, or other justice of the peace, having jurisdiction in the municipality," has no ap-

plication to sec. 129, sub-sec. 3 (a), and the statutory declaration therein referred to.

Semble, that sec. 93 of the Consolidated Municipal Act, 1903, to the effect that when joint owners or occupants are rated at an amount sufficient, if equally divided between them, to give a qualification to each, then each shall be deemed rated within the Act, otherwise none of them shall be deemed so rated, does not apply to the qualification of candidates.

Where persons elected as controllers of a municipality, when purporting to make the declaration required by sec. 311 of the Consolidated Municipal Act, 1903, as to their property qualification, omitted the statement as to encumbrances contained in the form embodied in the section, and in place of it stated that they were "in the actual occupation of the said premises," intending to take advantage of the provisions of sec. 76, sub-sec. 1, by which the value of the property, if occupied, if otherwise sufficient, shall not be affected or reduced by the incumbrances:—

Held, that this was a sufficient compliance with the provisions of the Act, and the declarants were not to be prejudiced by the fact that the Legislature had failed to alter the form of declaration in sec. 311, suitably for such a case.

Held, also, that the fact that in the declaration in referring to their qualification, the declarants had used the present tense instead of referring to the time of the election, was not a fatal objection, and an opportunity should be given to them to file a declaration in the proper form.

Rex ex rel. Mulligan v. Harrison et al., 475.

3. *Negligence*—"Lock-up"—*Lack of Proper Heating*—*Duties of Constable* — *Caretaker* — *Acting in Governmental Capacity*—*Consolidated Municipal Act*, 1903—3 *Edw. VII. ch. 19, secs. 493, 495, 520, 578, (O.)*.]—A municipality which maintains a "lock-up" is not liable in relation to prisoners who complain of negligence on the part of those in charge thereof, as, for example, in this case, of causing illness through lack of proper heating. In maintaining such a "lock-up," a municipality is not exercising its corporate powers for the benefit of the inhabitants in their local and particular interests, but is performing a public service entrusted to it in the interests of general government. A constable in charge of such a "lock-up," though appointed by the municipality, is not to be regarded as the servant or agent of the corporation, but as a public official, for whose acts or decisions civil responsibility does not attach to the municipality.

Per MABEE, J.:—In this case the negligence complained of was that of one who, though a constable, was acting entirely as servant of the corporation, employed in taking care of the municipal buildings of which the "lock-up" was a part, and the defendants were therefore liable.

An answer of a jury to a question submitted may be rejected as insensible or at unreasonable variance with the other answers. *Nettleton v. Town of Prescott*, 538.

4. *Local Option By-law*—*Motion to Quash*—*Adoption by Electors*—*Voters' Lists*—*Finality of*—*Meaning of "Scrutiny"*—7 *Edw.*

VII. ch. 4, sec. 24 (O.).]—In voting on a local option by-law, under the Liquor License Act, which requires the assent of the electors before the final passing thereof, the voters' lists, when revised and certified by the Judge, under the Ontario Voters' Lists Act, 7 *Edw. VII. ch. 4, sec. 24*, are (with certain exceptions specified in the section) final and conclusive evidence that all persons named therein, and no others, are qualified to vote on the by-law.

Voting on such a by-law is an "election," and a motion to quash the by-law is a "scrutiny," within the meaning of the 24th section.

Re Cleary and the Township of Nepean (1907), 14 O.L.R. 392, not followed. *In re Mitchell and Corporation of Campbellford*, 578.

5. *Election*—*Declaration of Qualification* — *Invalidity* — *Property Qualification* — *Joint Assessment* — *Fixed Assessment*—*Including School Taxes*—*Invalidity of By-law*—*Conflicting Interest*—*Contract with Corporation* — *Corrupt Practices*—*Evidence*—*Powers of Master in Chambers*—*Con. Mun. Act*, 3 *Edw. VII. ch. 19, secs. 129 (3a), 204, 311, 93, 591 a (g), 219 (2), 232, 248*.]—The Consolidated Municipal Act, 1903, 3 *Edw. VII. ch. 19, sec. 129 (3a)*, as amended by 4 *Edw. VII. ch. 22, sec. 4*, requires every candidate for the office of mayor or councillor in a town to file in the office of the clerk of the municipality a statutory declaration of qualification in accordance with the form contained in sec. 311 of the Act or to the like effect, in default of which such candidate shall be deemed to have resigned and his name shall be removed from the list of candidates. By 6 *Edw. VII. ch. 34, sec. 10, sub-*

secs. 1 and 2, the form of declaration is amended by adding to it statements that the candidate is "not a citizen or subject of any foreign country," and that the estate in respect of which he qualifies is assessed in his name, or in the name of his wife, on the last revised assessment roll of the municipality, to the value specified in the declaration. Neither of these requirements was complied with in the declarations filed by the persons elected as mayor and councillors of a town:—

Held, that the omission of these statements rendered the declarations invalid, and could not be cured by virtue of sec. 204 of the Act, and that the persons elected must be deemed to have resigned their offices.

Semle, that the declaration of qualification is invalid if made before the town clerk.

A councillor was jointly assessed with five other persons as tenant of a property assessed at \$6,780, so that his one-sixth share was less than \$1,200, being the amount required by sec. 76, sub-sec. 1 (b), read in connection with sec. 93 of the Act:—

Held, that the qualification was insufficient.

Principle of *Regina ex rel. Harding v. Bennett* (1896), 27 O.R. 314, applied.

A councillor was a member of a partnership to which the town had assumed to grant by by-law a fixed assessment "for all purposes, including school taxes":—

Held, that such agreement was *ultra vires* of the corporation under sec. 591 a, clause (g), of the Municipal Act, that the partnership firm was liable to an action by the corporation to have the

proper school rates levied upon the true assessable value of the property, and that the councillor's qualification was insufficient.

Regina ex rel. Macnamara v. Heffernan (1904), 7 O.L.R. 289, followed.

A councillor had done work for the school board which had to be done to the satisfaction of the town engineer, the account for which was not passed and paid until February, 1908:—

Held, that as a member of the council he was in a position where his duty might conflict with his interest, and must therefore be disqualified.

The mayor, as a member of the Citizens' League, had entered into a contract with the corporation, under an indemnity given by the league as to certain costs, by which he was apparently liable for the sum of \$19.66:—

Held, that he was thereby disqualified, and that to such a case the principle "*de minimis non curat lex*" does not apply.

Nell v. Longbottom, [1894] 1 Q.B. 767, followed.

In proceedings instituted under the Municipal Act to unseat a member of the municipal council, the Master in Chambers has power under sec. 248, as interpreted by sec. 219, sub-sec. 2 of the Act, to direct evidence as to the alleged corrupt practices to be taken before a county Judge.

Regina ex rel. Whyte v. McClay (1889), 13 P.R. 96, followed.

Rex ex rel. Beck v. Sharp (1908), ante 267, distinguished. *Rex ex rel. O'Shea v. Letherby*, 581.

See INTOXICATING LIQUORS, 1, 2, 3, 4, 6.—STREET RAILWAYS, 4.

NEGLIGENCE.

1. *Infant—Dangerous Machine—Duty to Warn—Superintendence—Workman's Compensation for Injuries Act—R.S.O. 1897, ch. 160, sec. 3, sub-sec. 2.*]—The plaintiff, a boy under fifteen, was engaged by the foreman of the defendants' factory to help any one who needed help on a certain floor, except one man who was doing piecework. He had been helping a man who was operating a stamping machine, to put plates through the machine, and the former leaving for a few minutes, he took hold of the press and endeavoured to get a plate out, and, apparently through his inadvertently touching the foot press, the die came down upon his hand, and he lost three fingers. It was admitted that the machine was a dangerous machine:—

Held (CLUTE, J., dissenting), that the defendants were liable under sec. 3, sub-sec. 2, of the Workmen's Compensation for Injuries Act, R.S.O. 1897, ch. 160, inasmuch as the foreman, whilst exercising superintendence, was negligent in not pointing out to the plaintiff which of the machines were dangerous, and cautioning and instructing him as to them, and, if it was intended that he should not attempt to operate any of them, expressly forbidding him to do so. *Lawson v. Packard Electric Co., Limited*, 1.

2. *Action for—Indemnity Held by Defendants—Evidence as to—Improper Admission of—New Trial—"Substantial Wrong or Miscarriage"—Con. Rule 785.*]—In an action by a workman under the Workmen's Compensation for Injuries Act, the plaintiff's counsel was allowed, against the strong objection of counsel for the de-

fendants, to prove the fact that the defendants were indemnified against any verdict that might be given in favour of the plaintiff by a policy of insurance with an accident and guarantee company. The trial Judge warned the plaintiff that he must be prepared to take the risk of submitting the evidence, and, in charging the jury, told them that it should form no element whatever in their decision:—

Held, that the evidence was improperly admitted.

Held, also (ANGLIN, J., dissenting), that, by reason of the admission of the evidence, a "substantial wrong or miscarriage" had been occasioned within the meaning of Con. Rule 785, and that the defendants were entitled to a new trial. *Loughead v. Collingwood Shipbuilding Co.* 64.

3. *Independent Contractor—Liability—Natural Gas Company—Exercise of Statutory Powers—Explosion—Collateral Negligence.*]—The defendant company, acting within their corporate powers and under the statutory powers conferred by R.S.O. 1897, ch. 200, sec. 3, and ch. 199, sec. 22, on such companies, instructed a contractor with whom they had a contract to do such work for them, to make connection with the place of business of the plaintiff's tenant for the supply of natural gas thereto. The contractor's employees negligently allowed gas to escape while constructing a trench for the service pipe from the defendants' main line, which had been laid along a public street, thus damaging the plaintiff's property:—

Held, that the defendants were liable.

The statutory power to break up and dig trenches in streets implied the duty of seeing that the gas was not allowed negligently to escape in dangerous quantities, which duty the defendants could not rid themselves of by delegating it to another. Such negligence was not merely collateral, but was negligence in the very act the contractor was engaged to perform for the defendants. *Ballentine v. Ontario Pipe Line Co.*, 654.

See MOTOR VEHICLES—MUNICIPAL CORPORATIONS, 3—RAILWAYS, 2—STREET RAILWAYS, 1, 3.

NEW TRIAL.

See NEGLIGENCE, 2—STREET RAILWAYS, 3—WILL, 4.

NOTICE.

Of Accident—Lapse of Time.—See MASTER AND SERVANT.

Of Loss of Goods—Condition of Contract.—See RAILWAYS, 1.

See INSURANCE, 1.

NOTICE OF MOTION.

See BANKRUPTCY AND INSOLVENCY.

OATH.

See INTOXICATING LIQUORS, 1—MUNICIPAL CORPORATIONS, 2.

ONUS.

Of Proof.—See MOTOR VEHICLES.

OPTION.

See SALE OF LAND, 3.

PARTIES.

See BANKS AND BANKING, 3—COMPANY, 2—COSTS—SALE OF LAND, 3.

PAROL EVIDENCE.

See INSURANCE, 2—SALE OF LAND, 4.

PARTNERSHIP.

Assignment of Assets to Company.—See BANKS AND BANKING, 3.

PASSENGERS.

Fares of School Children.—See STREET RAILWAYS, 4.

PENALTY.

See CRIMINAL LAW, 2.

PLEADING.

See INSURANCE, 3.

POLICE MAGISTRATE.

See INTOXICATING LIQUORS, 5.

POLL CLERKS.

Right to Vote.—See INTOXICATING LIQUORS, 3, 4.

PRACTICE.

See CONTEMPT OF COURT.

PREFERENCE.

See BANKRUPTCY AND INSOLVENCY.

PRINCIPAL AND AGENT.

Vendor and Purchaser—Name of Manager of Vendor's Agent inserted in Sale Agreement as Purchaser—Ignorance of Vendor—Assignment to Real Purchaser—Specific Performance.]—A sale of land was arranged between the agent of an intending purchaser and the owner's agent, the owner accepting the purchaser's offer although ignorant of his name. The purchaser refused to allow his name to appear in the agreement, which had been prepared by the vendor's solicitor with a blank for the purchaser's name, on the ground that it would affect other purchases which he proposed making in the neighbourhood. The office manager of the vendor's agent then inserted his own name as purchaser, with the object, as he said, of preventing the sale from falling through. Neither the vendor nor her solicitor knew of the position of the ostensible purchaser, and on the vendor inquiring who he was, was merely informed by the purchaser's agent that he was a "responsible person," upon which the vendor signed the agreement, which was then assigned to the plaintiff. A few days after a draft deed had been submitted and the deposit made, the vendor discovered who the nominal purchaser was and refused to carry out the sale:—

Held, that the sale could not be supported, as there had not been a full and fair disclosure of material circumstances in connection with the transaction, in leaving the vendor in ignorance of the position of the purchaser as the representative of the vendor's agent.

Judgment of the Divisional Court reversed, and that of the

Judge at the trial restored. *McGuire v. Graham*, 431.

See **BANKS AND BANKING**, 4.

PRIORITY.

See **SALE OF LAND**, 3.

PROHIBITION.

See **INTOXICATING LIQUORS**, 2.

PROMISSORY NOTES.

See **BILLS OF EXCHANGE AND PROMISSORY NOTES**.

PROXIES.

See **COMPANY**, 2.

PUBLIC SCHOOLS.

See **SCHOOLS**.

PUBLIC WORKS.

Sale of Liquor Near.]—See **INTOXICATING LIQUORS**, 5.

PURCHASER.

See **SALE OF LAND**, 4.

QUALIFICATION.

Of Controllers—Of Mayor or Councillors.] — See **MUNICIPAL CORPORATIONS**, 2, 5.

QUO WARRANTO.

See **MUNICIPAL CORPORATIONS**,

1.

RAILWAYS.

1. *Carriage of Goods—Loss of Boxes Shipped—Condition of Contract—Necessity for Notice of Loss.*]

—One of the conditions of a railway way-bill was that there shall be “no claim for damage for loss of or detention of, or injury or damage to, any goods for which the company is accountable, unless and until notice in writing and the particulars of the claim of said loss, damage, or detention, are given to the station freight agent at or nearest to the place of delivery within thirty-six hours after the goods in respect of which said claim is made, or such portion of them as are not lost are delivered.”

Two boxes of blankets shipped by the plaintiff were re-shipped by the railway to the original place of shipment, and an advice note of their arrival sent to the plaintiff, which stated that there was “one box short”:—

Held, that under the terms of the condition the box could not be said to be “lost,” and notice in writing by the plaintiff to the defendants, within the thirty-six hours of the receipt of the advice note of the loss of the box, was not essential to entitle the plaintiff to recover its value. *Sheppard v. Canadian Pacific R.W. Co.*, 259.

2. *Accident to Employee—Watchman at Crossing—Backing Train—Negligence—Liability—Railway Act—R.S.C. 1906, ch. 37, sec. 276.*]

—A watchman of the defendant company at a certain crossing in a city was killed by two cars being “kicked off” in the usual way from a train which was backing in an easterly direction for that purpose. A brakeman with a lamp was on top of the western-most of the two cars, but was not keeping a look-out, and gave no warning

that the cars were moving. There was no light on the crossing, nor was any one stationed on the cars “kicked off,” to warn people, and the engine bell was ringing:—

Held, that the defendants were guilty of negligence and were liable for his death, not having complied with sec. 276 of the Railway Act, R.S.C. 1906, ch. 37, by stationing a person on the front car to warn people.

Although the deceased was an employee of the defendants and it was his duty to protect persons crossing the track from the cars, he had a right to rely, so far as his own safety was concerned, on nothing being done to expose him to unnecessary danger, and on the above section being complied with.

Canadian Pacific R.W. Co. v. Boisseau (1902), 32 S.C.R. 424, followed. *Lamond v. Grand Trunk R.W. Co.*, 365.

See STREET RAILWAYS.

REGISTRATION.

See SETTLED ESTATES.

RES JUDICATA.

See WATER AND WATERCOURSES, 1.

RESCISSION.

Of Contract.]—See SALE OF LAND, 1.

RIVERS.

See WATER AND WATERCOURSES, 1, 2.

RULES.

Con. Rule 4.]—See CONTEMPT OF COURT.

Con. Rule 138.]—*See* FOREIGN JUDGMENTS.

Con. Rule 206 (3).]—*See* WILLS, 5.

Con. Rule 439 (a).]—*See* EVIDENCE.

Con. Rule 589.]—*See* DEFAMATION.

Con. Rule 603.]—*See* FOREIGN JUDGMENT.

Con. Rule 784.]—*See* BANKRUPTCY AND INSOLVENCY.

Con. Rule 785.]—*See* NEGLIGENCE, 2.

Con. Rule 826.]—*See* APPEAL, 3.

Con. Rule 827 (2).]—*See* APPEAL, 1.

Con. Rule 1130 (1).] — *See* BANKRUPTCY AND INSOLVENCY.

SALE OF LAND.

1. *Misrepresentations — Rescission—Affirmation by Purchaser After Knowledge — Occupation Rent—Judgment.*]—The defendant bought a house and lot from the plaintiff for \$1,400, purchase money to be payable by instalments of \$10 a month. The contract further provided that unless the amounts were punctually paid, all payments made should be forfeited and all rights of the defendant cease and determine, and the plaintiff be at liberty to re-enter. The defendant paid the first three instalments, although before paying the third he became aware of misrepresentations of the plaintiff inducing the contract. He refused to pay the fourth instalment, but continued to hold possession. The plaintiff brought this action for possession, and claimed for use and occupation since the last payment on the contract. The defendant counterclaimed for rescission and return of his money

paid, and in the alternative damages for the misrepresentations:—

Held, that the defendant had by his conduct affirmed the contract after knowledge of the misrepresentations, and that the plaintiff was entitled to judgment for possession unless the defendant should elect to pay the proper value of the property, having regard to the amount to be deducted as compensation for misrepresentations. If he declined to do this, the measure of the defendant's damages would be the amount which he had paid, less a proper occupation rent. *Webb v. Roberts*, 279.

2. *Payment of Purchase Money by Instalments — Conveyance on Payment of Fixed Portion of Purchase Money—Right to Sue for Instalments without Tender of Conveyance.*]—Where by an agreement for the sale of land the purchase money is payable by instalments with interest, and on payment of a fixed portion of the purchase money, the purchaser is to have a conveyance, he giving back a mortgage for the balance due, the vendor is entitled to recover the instalments falling due within such limit, without the tender of a deed to the purchaser.

Where an agreement for the sale and purchase of land is made with the purchaser, "or assigns," the former is not relieved from his obligation under the contract by assigning it unless the vendor has accepted the assignee in place of the purchaser.

Judgment of the Divisional Court, 15 O.L.R. 280, affirmed. *H. H. Vivian Co., Limited, v. Clergue*, 372.

3. *Deed—Fraud—Conveyance of Same Land to Two Purchasers—Priorities—Option — Agreement*

—*Registration—Action to Remove Cloud on Title—Leave to Amend—Parties—Grantor—Specific Performance—Terms.*]—By a writing under seal, but without consideration, dated the 2nd January, 1907, M. covenanted and agreed with the plaintiff that if at any time he (M.) should be desirous of selling the land described in the document, he would give the plaintiff the option of first chance to purchase the same at \$40 per acre, and to give the plaintiff 30 days' notice in writing of intention to sell the property, etc. On the 14th January, 1907, M. signed a written offer, binding for three months from the date, to sell the same land to the defendant at a larger price. On the following day, but after the defendant had express notice of the agreement with the plaintiff, M. executed a formal written agreement to sell the land to the defendant, and the defendant, two days later, paid part of the consideration named and received from M. a conveyance of the land. The plaintiff's agreement or option and the defendant's agreement of the 15th January were both registered on the 15th January, and the defendant's deed on the 17th January. On the 22nd April, 1907, M. conveyed the same land to the plaintiff, and received a payment on account from the plaintiff; this conveyance was registered on the 24th April, 1907.

In an action to set aside the defendant's agreement of the 15th January and the deed registered the 17th January as being void, and to remove the same as a cloud upon the plaintiff's title, M. being brought in as a third party:—

Held, that the writing of the 2nd January was not a mere option, but a contract with the plaintiff to give him a binding option for 30

days after notice of desire to sell, and, being under seal, there was no need for a consideration; that the defendant took his agreement and conveyance subject to the rights of the plaintiff; but that these instruments were not tainted with fraud, and could not be declared void; as the defendant had full notice of the agreement of the 2nd January, he was thereafter in the same position *quoad* the plaintiff as M. had previously been, and was bound to do the same acts as M. in respect of the land; and, while the plaintiff's action as framed failed, his remedy lay in a claim for specific performance against the defendant and M.; and he was allowed to amend, upon terms, by adding M. as a party defendant and seeking the remedy suggested.

Judgment of Teetzel, J., reversed. *Savereux v. Tourangeau*, 600.

4. *Contract for Sale of Land—Time of Essence—Time for Completion—Delay of Purchaser—Default of Vendor to Tender Conveyance—Duty as to Preparation—Misdescription of Land—Statute of Frauds—Misrepresentation—Mistake—Specific Performance.*]—The contract for the sale and purchase of land set up by the plaintiff, the purchaser, consisted of a written offer by him to buy and a written acceptance by the defendant of his offer. The offer contained, *inter alia*, the following provisions: "This offer to be accepted by September 25th, A.D. 1906, otherwise void, and sale to be completed on or before the 10th day of October, 1906." "Time shall be of the essence of this offer." "Deed . . . to be prepared at the expense of the vendor and mortgage at my expense":—

Held, that time was of the essence as to all the terms of the contract; but that the duty of the purchaser to make tender of his purchase money did not arise until the vendor had done that which it was incumbent upon her to do to put herself in a position to complete the sale; it was her duty to prepare the conveyance and submit the same for approval, having regard to the provision last quoted; and, having failed to do so, her default precluded her from setting up the lapse of the time at which the sale should have been completed as an answer to the plaintiff's claim for specific performance.

Among the words of description of the parcel of land in question, the contract contained the words, "being the premises known as number 22 Ann street." The correct number was 24; there was no number 22; and the defendant owned no other property in Ann street:—

Held, that there being a description which identified the parcel without the aid of the street number, the words quoted might be rejected as surplusage, and there remained sufficient, with parol evidence, to satisfy the Statute of Frauds; OSLER, J.A., *dubitante*.

Held, also, upon the evidence, that misrepresentation and mistake such as would afford ground for refusing specific performance were not shewn.

Judgment of a Divisional Court, 15 O.L.R. 362, awarding specific performance, affirmed. *Foster v. Anderson*, 565.

See PRINCIPAL AND AGENT,

SCHOOL CHILDREN.

Fares of.—See STREET RAILWAYS, 4.

SCHOOLS.

Public Schools—Union School Section—Formation of—Appeal from Township Councils—Lands Mentioned in Petitions—Exclusion of, and Inclusion of Other Lands—Powers of Arbitrators—1 Edw. VII. ch. 39, secs. 42, 46, 47 (O.).—Petitions were presented to the councils of two townships, asking for the formation of a union school section under the Public Schools Act, 1 Edw. VII. ch. 39, sec. 46 (1). The councils having refused to pass a by-law, an appeal was had to the county council, under sec. 47, as a result of which arbitrators were appointed:—

Held, that the arbitrators appointed by the county council had the right, in forming the union school section, to leave out, or take in, land not mentioned in the petitions, and that their jurisdiction was not limited to a mere granting or rejecting of the prayer of the petitions.

In re Churchill and Township of Hullett (1905), 11 O.L.R. 284, followed.

In re Sydenham School Sections (1904), 7 O.L.R. 49, distinguished. *In re School Section No. 3, Mersea*, 617.

SCRUTINY.

Passing By-law before Time Elapsed for.—See INTOXICATING LIQUORS, 1, 3, 4—MUNICIPAL CORPORATIONS, 4.

SEQUESTRATION.

See CONTEMPT OF COURT.

SERVANT.

See MASTER AND SERVANT.

SETTLED ESTATES.

*Settled Estates Act—Life Tenant—Lease by—Registration of Lease—Death of Life Tenant before Registration—Invalid Lease—R.S.O. 1897, ch. 71, secs. 32, 42, 43—R.S.O. 1897, ch. 330, sec. 24.]—*A testator devised lands upon trust “to allow my wife so long as she remains my widow and no longer the use and occupation and the rents, issues, and profits for her own use absolutely.” And he directed that upon re-marriage or death of his wife the land should be sold and the proceeds divided among his children. He died in 1897, and in January, 1906, his widow leased the land for five years with right of renewal, and died in April, 1906. The lease was registered in December, 1906. The executors of the testator received the rent monthly after the death of the widow till February, 1907, when they sold the land:—

Held, that the land was a settled estate within the meaning of the Settled Estates Act, R.S.O. 1897, ch. 71, and the estate during widowhood was an estate for life within sec. 42 of that Act, and that the lease when registered took effect, notwithstanding the payment of rent in the meantime to the executors, the rights of a *bonâ fide* purchaser for value without notice not having intervened.

Held, also, that if this were not so the lease at any rate must be considered in equity as a contract for a valid lease, by virtue of R.S.O. 1897, ch. 330, sec. 24. *National Trust Co. v. Shore*, 177.

SHARES.

*General Power of Shareholder.]—*See COMPANY, 2.

*Right to Distribution of.]—*See TRUSTS AND TRUSTEES.

See COMPANY, 4.

SLANDER.

See DEFAMATION.

SNOW.

*Removal of.]—*See STREET RAILWAYS, 2.

SOLICITOR.

*Undertaking of.]—*See WILL, 5.

SPECIAL ENDORSEMENT.

See FOREIGN JUDGMENT.

SPECIFIC PERFORMANCE.

See PRINCIPAL AND AGENT—SALE OF LAND, 3—VENDOR AND PURCHASER.

STATUTE OF FRAUDS.

See BANKS AND BANKING, 4.

STATUTES.

29 Car. 11 ch. 3, sec. 4 (Statute of Frauds).....
See BANKS AND BANKING, 4.

30, 31 Vict. ch. 3, 1867, sec. 91, sub-sec. 27 (British North America Act, Imp. Act).....
See CONTEMPT OF COURT.

38 Vict. ch. 75 (O.) (Union of Presbyterian Churches).....
See WILLS, 4.

- 47 Vict. ch. 83, sec. 6 (O.) (Act to amend Act incorporating the Ontario Methodist Camp Ground Co.).....
See COMPANY, 5.
- 53 Vict. ch. 31, sec. 73 (D.) (Bank Act, 1890).....
See BANKS AND BANKING, 3.
- 53 Vict. ch. 31, sec. 46 (D.) (Bank Act, 1890).....
See BANKS AND BANKING, 1.
- 55 Vict. ch. 99, sec. 25 (O.) (Act incorporating the Toronto Railway Co.)
See STREET RAILWAYS, 2.
- 63 Vict. ch. 17, sec. 14 (O.) (Act to amend Statute Law).....
See BANKRUPTCY AND INSOLVENCY—CERTIORARI.
- 63 Vict. ch. 24 (O.) (Act respecting the licensing of Extra Provincial Corporations).....
See EVIDENCE.
- R.S.O. 1897, ch. 39 (Act respecting the Sale of Intoxicating Liquors near Public Works).....
See INTOXICATING LIQUORS, 5.
- R.S.O. 1897, ch. 51, sec. 70 (2), sec. 76 (c) (The Judicature Act).....
See APPEAL, 1, 3.
- R.S.O. 1897, ch. 59, secs. 19, 34 (The Surrogate Courts Act).....
See EXECUTORS AND ADMINISTRATORS—SURROGATE COURTS.
- R.S.O. 1897, ch. 60, sec. 158, sub-secs. 2, 190 (The Division Courts Act)..
See APPEAL, 2—DIVISION COURTS.
- R.S.O. 1897, ch. 68, sec. 5 (Act respecting Actions of Libel and Slander)..
See DEFAMATION.
- R.S.O. 1897, ch. 71, secs. 32, 42, 43 (The Settled Estates Act).....
See SETTLED ESTATES.
- R.S.O. 1897, ch. 111, sec. 1 (Act adopting the law of England in certain matters).....
See WATER AND WATERCOURSES, 2.
- R.S.O. 1897, ch. 112, sec. 4 (The Mortmain and Charitable Uses Act)..
See WILLS, 4.
- R.S.O. 1897, ch. 142, sec. 13.....
See WATER AND WATERCOURSES, 1.
- R.S.O. 1897, ch. 147, sec. 20 (Assignments and Preferences Act).....
See BANKRUPTCY AND INSOLVENCY—CERTIORARI.
- R.S.O. 1897, ch. 153, sec. 19 (The Mechanics' Lien and Wage Earners Act).....
See MECHANICS' LIEN.
- R.S.O. 1897, ch. 160, sec. 3, sub-sec. 2, secs. 9-14 (Workmen's Compensation for Injuries Act).....
See MASTER AND SERVANT—NEGLIGENCE, 1.
- R.S.O. 1897, ch. 167 (Deserted Wives' Maintenance Act).....
See CRIMINAL LAW, 1.
- R.S.O. 1897, ch. 191, secs. 47, 49 (Ontario Companies Act).....
See BILLS OF EXCHANGE AND PROMISSORY NOTES—COMPANY, 2.
- R.S.O. 1897, ch. 199, sec. 22 (Act respecting Joint Stock Companies for supplying cities, towns, and villages with gas and water).....
See NEGLIGENCE, 3.
- R.S.O. 1897, ch. 200, sec. 3 (Act respecting Companies for supplying steam heat, electricity, or natural gas, for light, heat or power).....
See NEGLIGENCE, 3.
- R.S.O. 1897, ch. 203, secs. 148 (2), 159, 160 (Ontario Insurance Act).....
See INSURANCE, 2, 3.
- R.S.O. 1897, ch. 245, sec. 11, (sub-sec. 5), secs. 20 (sub-sec. 1), 49, 141 (Liquor License Act).....
See INTOXICATING LIQUORS, 1, 2, 3, 4, 5, 6.
- R.S.O. 1897, ch. 330, sec. 24 (Act respecting Real Property).....
See SETTLED ESTATES.
- R.S.O. 1897, ch. 333, sec. 7, sub-sec. 6 (Mortmain and Charitable Uses Act, 1902).....
See WILLS, 4.
- 1 Edw. VII. ch. 39, secs. 42, 46 (1), 47 (O.) (Act to amend the Assessment Act).....
See SCHOOLS.
- 3 Edw. VII. ch. 19, secs. 76 (sub-sec. 1), 93, 129 (sub-sec. 3 (a)), 204, 219 (2), 232, 248, 311, 315, 347, 369, 371, 420, 473, 493, 495, 520, 578, 591 a (g) (Consol. Mun. Act, 1903).....
See MUNICIPAL CORPORATIONS, 1, 2, 3—INTOXICATING LIQUORS, 3, 4, 5.
- 4 Edw. VII. ch. 11, sec. 2 (O.) (Act to amend Judicature Act).....
See APPEAL, 3.
- 4 Edw. VII. ch. 12, sec. 2 (O.) (Act to amend the Division Courts Act)..
See APPEAL, 2.

- 4 Edw. VII. ch. 22, sec. 4 (O.) (Municipal Amendment Act, 1904).....
See INTOXICATING LIQUORS, 5—
 MUNICIPAL CORPORATIONS, 2, 5.
- 6 Edw. VII. ch. 34, sec. 10 (O.), subsecs. 1, 2 (Municipal Amendment Act, 1906).....
See INTOXICATING LIQUORS, 5—
 MUNICIPAL CORPORATION, 5.
- 6 Edw. VII. ch. 46, sec. 13 (O.) (Act to Regulate the Speed and Operation of Motor Vehicles on Highways)..
See MOTOR VEHICLES.
- 6 Edw. VII. ch. 47, secs. 10, 24 (O.) (Act to amend the Liquor License Laws).....
See INTOXICATING LIQUORS, 1, 2, 3.
- 6-7 Edw. VII. ch. 20, secs. 56, 60, 61 (*d*) (Industrial Disputes Investigation Act, 1907).....
See CRIMINAL LAW, 2.
- 7 Edw. VII. ch. 4, sec. 24 (O.) (Ontario Voters' Lists Act).....
See INTOXICATING LIQUORS, 3—
 MUNICIPAL CORPORATIONS, 4.
- 7 Edw. VII. ch. 34, sec. 87 (O.) (Ontario Companies Act).....
See COMPANY, 2.
- R.S.C. 1906, ch. 29, secs. 46, 76, 88, 90 (Bank Act).....
See BANKS AND BANKING, 1, 2, 3, 4.
- R.S.C. 1906, ch. 37, sec. 276½ (Railway Act).....
See RAILWAYS.
- R.S.C. 1906, ch. 144 (Winding-up Act)
See COMPANY, 1.
- R.S.C. 1906, ch. 145, sec. 36 (Canada Evidence Act).....
See MUNICIPAL CORPORATIONS, 2.
- R.S.C. 1906, ch. 146, secs. 61, 242 1124, part XV. (Criminal Code)..
See CRIMINAL LAW, 1, 2.

Statutes—Construction of.]—See
 CRIMINAL LAW, 2—INTOXICATING
 LIQUORS, 6.

STATUTORY CONDITIONS.

See INSURANCE, 1.

STREAMS.

See WATER AND WATERCOURSES, 1, 2.

STREET RAILWAYS.

1. *Accident—Negligence—Evidence—Leaning Over to Expectorate.*—The plaintiff, as a passenger, was about midnight, standing on the back platform of one of the defendants' cars, smoking a cigar and leaning upon the railway gate or grating at the side, over which he leaned, from time to time, a distance from five to seven inches, and expectorated. Apparently, while doing so, he was struck by something and received the injuries complained of. The plaintiff alleged, in his statement of claim, that he was struck by a post belonging to the defendants and used by them for their trolley wire, but gave no evidence as to this. As a matter of fact, there were trolley poles along the line of the defendant railway on the side where the plaintiff was struck, but there was no evidence given by the plaintiff of their position, and the evidence for the defendants placed them about two feet from the overhang of the car:—

Held, (reversing the judgment of the Divisional Court), that the plaintiff's action should be dismissed, as there was no evidence of what caused the injury; MEREDITH, J.A., dissenting.

Per RIDDELL, J. (in the Divisional Court):—While it is impossible to lay down any specific rule for the guidance of railways or street railways generally, a railway operating in a country in which tobacco chewing or gum chewing is not uncommon must expect its patrons, or some of them, to be tobacco and gum chewers, and if it be the custom of such passengers to put their heads past the lines of the car to expectorate, the railway should

be held to know of such custom, and should either remove all obstructions from the side of the track a sufficient distance to avoid the probability of an accident, or prevent the passengers from projecting their heads over the side, or at least give proper warning as to the danger. And in every case the railway must take all reasonable precautions against an accident happening to one who is acting as in the ordinary course of affairs "in the vicinage" it may be expected that some will act.

The Massachusetts rule that it is necessarily negligence for one riding in a railway car to project any portion of his person out of the window not followed by the Divisional Court. *Simpson v. Toronto and York Radial R.W. Co.*, 31.

2. *Removal of Snowfalls — Electric Sweeper—Construction of Agreement—Deposit of Snow—Removal of*—55 Vict. ch. 99, sec. 25 (O.).]—The agreement with the plaintiffs under which the defendants' railway is operated provides that the track allowances shall be kept free from snow at the expense of the defendants, so that the cars may be in use continuously; and that if the fall of snow is less than six inches at any one time, the defendants must remove the same from the tracks, and shall, if the city engineer so directs, evenly spread it on the adjoining portions of the roadway but should the quantity of snow at any time exceed six inches in depth, the whole space occupied as track allowances shall be at once cleared of snow, and the snow removed and deposited at such points on or off the street as may be ordered by the city engineer.

55 Vict. ch. 99, sec. 25 (O.), passed to construe the above, enacts that the defendants shall not deposit snow on any street, square, highway or other public place in the city of Toronto without having first obtained the permission of the city engineer:—

Held, that there was nothing in the above to prevent the defendants from sweeping the small snowfalls, or the large, to the sides of the road by means of an electric sweeper, and (MEREDITH, J.A., dissenting) the purpose of the application being to prevent the use of the sweeper altogether, the appeal should be dismissed.

Per OSLER, J.A.:—When the snowfall was less than six inches at a time the company might leave it at the side of the road unless that would create a nuisance.

Per GARROW, and MEREDITH, JJ.A.:—In all cases the company was bound to remove the snow and ice after sweeping it aside unless the city engineer directed that it be spread there. *City of Toronto v. Toronto R.W. Co.*, 205.

3. *Railways — Accident — Negligence — Contributory Negligence — Non-disposal of — Questions in Issue—New Trial.*]—The deceased, in attempting to cross over one of the streets of a city on which there were street car lines, passed behind one of the cars, and was just stepping on to the track on which cars coming in the opposite direction ran, when she fell and was struck by an approaching car and killed. In an action brought to recover damages therefor, the jury, while finding that there was negligence on the defendants' part in running at too high a rate of speed, and

t that there was contributory negligence on the deceased's part in not taking proper precautions before attempting to cross, also found that the defendants could have avoided the accident had the car been running at a reasonable rate of speed. Upon their answers judgment was entered for the plaintiff:—

Held, GARROW, J., dissenting, that on these findings, the judgment could not be supported, and a new trial was directed. *Hinsley v. London Street Railway Co.*, 350.

4. *By-law of Municipality—Passenger Fares—School Children—Reduced Rates.*—Under a municipal by-law governing a street railway, it was provided that the ordinary cash fare should be 5 cents, children under five years of age, not occupying a seat and accompanied by its parent, to be carried free; and for every child under twelve years of age, except as aforesaid, the fare should not exceed 3 cents. Tickets were to be issued and sold at the following rates: Ordinary tickets, six for 25 cents, each ticket to be taken for an ordinary 5 cent cash fare; children's and school children's tickets ten for 25 cents, each ticket to be taken for a 3-cent fare, as above provided; working-men's special tickets, eight for 25 cents, to be taken for a 5-cent fare:—

Held, reversing the order of the Ontario Railway and Municipal Board, that the children entitled to school children's tickets were those under the age of twelve years, and not those under twenty-one, even though the latter were actually attending school. *In re Township of Sandwich East and Windsor and Tecumseh Electric R.W. Co.*, 641.

STRIKES.

See CRIMINAL LAW, 2.

SUBROGATION.

See BANKS AND BANKING, 2.

SURROGATE COURTS.

Removal of Cause into High Court—Will—Undue Influence—Value of Estate—Importance of Issues.—Upon an application under sec. 34 of the Surrogate Courts Act to remove a cause from a surrogate court into the High Court, the importance of the case and its nature are not to be tried on counter-affidavits: it is enough if it appears from the nature of the contest and the magnitude of the estate that the higher Court should be the forum of trial. Much is left to the discretion of the High Court Judge as to the disposal of each application.

And where the contest was over the will of a widow, whose husband died in 1905, leaving to her an estate valued at over \$27,000, which had shrunk at her death in 1907 to \$5,850, and the allegation was that she had not been able to protect herself against the undue influence of the chief beneficiaries, her two sons, to whom it was said a large part of her husband's estate had been transferred in her lifetime—an order was made for the removal of the cause into the High Court. *In re Reith et al. v. Reith et al.*, 168.

See EXECUTORS AND ADMINISTRATORS.

TENANT.

See LANDLORD AND TENANT.

TENDER.

Of Conveyance.—See SALE OF LAND, 2, 4.

TIMBER.

Removal of, by Wrongdoer—Subsequent bonâ fide Sale.—See DAMAGES.

TIME.

Essence of Contract.—See SALE OF LAND, 4.

Extension of Time for Appeal.—See APPEAL, 2.

Lapse of.—See INSURANCE, 3.

Notice of Action.—See MASTER AND SERVANT.

Notice of Publication of By-law—Three Weeks—Meaning of.—See INTOXICATING LIQUORS, 1.

Two Weeks for Scrutiny—Passing By-law Before Expiration of.—See INTOXICATING LIQUORS, 1, 4—MUNICIPAL CORPORATIONS, 4.

TITLE.

Cloud on—Action to Remove.—See SALE OF LAND, 3.

TRUSTS AND TRUSTEES.

Shares in Company—Trustee for Several Beneficiaries—Right of One Beneficiary to Apportionment.—Where a trustee held a number of shares in the capital stock of a company in trust for several persons, each of whom was entitled to a certain proportion of the face value of the same, but no provision was made for sale or division of the stock, and no time was fixed during which the trustee was to hold, and one of the *cestuis*

que trust brought an action to compel the trustee to transfer to him a portion of the shares equivalent to his interest, but the other *cestuis que trust* were not made parties to the action and objected to the transfer being made:—

Held, that, independently of the question of the interests of the unrepresented *cestuis que trust*, the trustee could not be compelled to discharge his trust piecemeal. *Bechtel v. Zinkann*, 72.

ULTRA VIRES.

See COMPANY, 3—INTOXICATING LIQUORS, 6.

UNDUE INFLUENCE.

See WILL, 4.

VENDOR AND PURCHASER.

See SALE OF LAND, 4.

VOTERS' LISTS.

See INTOXICATING LIQUORS, 1, 3—MUNICIPAL CORPORATIONS, 4.

WAREHOUSE RECEIPTS.

See BANKS AND BANKING, 3.

WATER AND WATER-COURSES.

1. *Rivers and Streams Act—District Judge—Order Fixing Tolls on Logs Floated Prior to Order—Mandamus—Res Judicata.*—An application was made by the owners of certain constructions and improvements on a river to the district Judge, under R.S.O. 1897,

ch. 142, sec. 13, for an appointment to fix a rate to be paid for tolls in respect of logs driven some three or four years previously, at which time no rate had been fixed. The district Judge refused to make the appointment. The applicant then applied to a Judge of the High Court for an order of mandamus requiring the district Judge to hear evidence and make an order fixing such tolls, which was refused, on the ground that the matter was *res judicata* under a former decision of a Divisional Court. (See 3 O.W.R. 333 and 10 O.L.R. 193.) The applicants then appealed to a Divisional Court, who dismissed the appeal granting leave to appeal to the Court of Appeal, who also dismissed the appeal, Garrow, J.A., dissenting. *Beck Manufacturing Co. v. Valin and the Ontario Lumber Co.*, 21.

2. *Rivers and Streams—Non-tidal Rivers—Grant of Lands Bordering on—Title to Bed of River ad Medium Filum Aquæ—Common Law Doctrine—R.S.O. 1897, ch. 111, sec. 1.*—The common law of England relative to property and civil rights—as introduced into this Province in 1792, now enacted in the R.S.O. 1897, ch. 111, sec. 1—except in so far as repealed by Imperial legislation having force in this Province, or by provincial enactments, is the rule for the decision of the same. Where a grant of land is made bordering on a river, if a tidal river, the title to the bed is presumed to remain in the Crown, unless otherwise expressed in the grant; whereas if non-tidal, whether navigable or not, the title in the bed *ad medium filum aquæ* is presumed *prima facie* to be in the riparian proprietor.

Where, therefore, lands were

granted by the Crown bounded by the Winnipeg River, a non-tidal river, the title to the bed of the river *ad medium filum aquæ* was held to have passed to the riparian owners by virtue of the grant to them, there being nothing in the grants, particulars of which are set out in the case, to rebut the presumption.

Judgment of ANGLIN, J., at the trial, varied. *Keewatin Power Co. v. Town of Kenora, Hudson's Bay Co. v. Town of Kenora*, 184.

WILL.

1. *Construction—Gift of Income—Vesting of Corpus—General Rule—Contrary Intention.*—The rule that a gift of income without limitation of time operates as a gift of the corpus, in the absence of other disposition thereof, does not apply to a case in which the testator has expressed an intention that the corpus should not be vested in the donee.

Therefore, where a testator directed by his will that a sum of money should be invested by his executors upon trust to pay the interest to the A. W. hospital in the city of S., for the benefit of poor patients, so long as said A.W. hospital should be used for hospital purposes, and that, in the event of said hospital ceasing at any time to be so used for one year, the interest should be devoted to other charitable purposes:—

Held, that the testator's intention that the corpus should not be vested in or paid to the hospital was sufficiently expressed, and precluded the application of the general rule. *Re Chambers, Chambers v. Wood*, 62.

2. *Construction—Gift of Whole Estate—Incomplete Enumeration—“Appurtenances”—Farm Stock and Implements — “Household Goods”—Money—Intestacy.*]—A testator by his will, after directing payment of debts, etc., proceeded: “I give, devise, and bequeath all my real and personal estate which I may die possessed of or interested in, in the manner following, that is to say: I give, devise, and bequeath to my son W. my farm . . . which is my present residence, and all appurtenances connected therewith, with all my household goods of which I may die possessed;” and appointed an executor:—

Held, that all the testator’s estate, including money, farm stock, and farm implements, passed by the will to the son named. *Re Hudson*, 165.

3. *Personal Property—Restraint on Alienation—Invalidity.*]—A testator directed that his estate should be invested and the income paid to his two sons equally until they reached the age of thirty-five, when they were to receive the principal, and he further declared that “none of my children shall have power to anticipate or alienate, either voluntarily or otherwise, any portion of my estate to which they may be entitled previous to the time at which the same may become payable to them as herein declared.”

Notwithstanding the above, one of the sons assigned his interest under the will to various creditors:—

Held, that the assignments were valid, and the restriction on alienation which the testator had sought to impose invalid.

The reasons for the rule of equity which enables a restraint against alienation and anticipation to be imposed on the separate estate of a married woman do not apply to such a case. *McFarlane v. Henderson*, 172.

4. *Mortmain and Charitable Uses — Presbyterian Church in Canada—Validity of Devise—Testamentary Capacity — Attesting Witnesses as to—Undue Influence—New Trial.*]—A residuary devise of realty to the Foreign Missionary Society of the Presbyterian Church in Canada is valid under the Mortmain and Charitable Uses Act, R.S.O. 1897, ch. 112, sec. 4, notwithstanding *ibid.* ch. 333, sec. 7, sub-sec. 6, which requires “assurances” of land for charitable uses to be made six months before the donor’s death, “assurances” in that section not including gifts by will; and also notwithstanding that the special Act relating to devises to the said church, 38 Vict. ch. 75 (O.), requires wills of realty and impure personalty in favour of that church, to be made 6 months before the testator’s death.

In an action to impeach a will on the ground of undue influence, it should not be upheld on the evidence of one witness, whose credibility is attacked, when the attesting witnesses may also be examined; and a new trial was ordered in this case because this had not been done.

As a general thing, witnesses to a will should inspect and judge of the testator’s sanity before they attest. If he is not capable the witnesses ought to remonstrate and refuse their attestation.

Judgment of RIDDELL, J., at the trial, reversed. *Madill v. McConnell*, 314.

5. *Construction—Bequest to Putative Wife—Falsa Demonstratio—Solicitor's Undertaking—Failure to Fulfil—Costs.*]—A testator left certain property to "my wife, J. R.," who had gone through a form of marriage with him in 1902, and had lived with him as his wife till his death in 1906, but who was in fact still the wife of another man, a supposed divorce from the latter being invalid:—

Held, that the bequest was good, and J.R. entitled to the property.

In the course of the trial the counsel and solicitor for the plaintiffs undertook that the other next-of-kin to the testator should be added as plaintiffs. This undertaking he was unable to fulfil, as the next-of-kin referred to refused to sign a written consent thereto, as required by Con. Rule 206 (3):—

Held, that as the solicitor was unable to fulfil his undertaking through no fault of his own, and as, if he had asked for an order (subsequently made) for representation, it would have been granted, he should not be ordered to pay the costs of the action unobtainable from the plaintiffs, except those of speaking to the case after failure to add the parties. *Reeves v. Reeves*, 588.

Undue Influence.]—See SURREGATE COURTS.

WINDING-UP ACT.

See COMPANY, 1.

WITNESS FEES.

See COSTS.

WORDS.

"By Number or Otherwise."—See INSURANCE, 2.

"Criminal Matter."—See CONTEMPT OF COURT.

"Execution."—See CONTEMPT OF COURT.

"Farm Stock and Implements."—See WILL, 2.

"Happening of the Event Insured Against."—See INSURANCE, 3.

"Hearing of Action."—See MASTER AND SERVANT.

"Lock-up."—See MUNICIPAL CORPORATIONS, 3.

"Money."—See WILL, 2.

"Operation."—See CONTEMPT OF COURT.

"Scrutiny."—See MUNICIPAL CORPORATIONS, 4.

"Substantial Wrong or Mis-carriage."—See NEGLIGENCE, 2.

"Tavern, Inn, or Other House of Public Entertainment."—See INTOXICATING LIQUORS, 1.

"Year."—See INTOXICATING LIQUORS, 3.

WORKMEN'S COMPENSATION FOR INJURIES ACT.

See MASTER AND SERVANT—NEGLIGENCE, 1.

WRIT OF SUMMONS.

See FOREIGN JUDGMENT.

YEAR.

See INTOXICATING LIQUORS, 6.

